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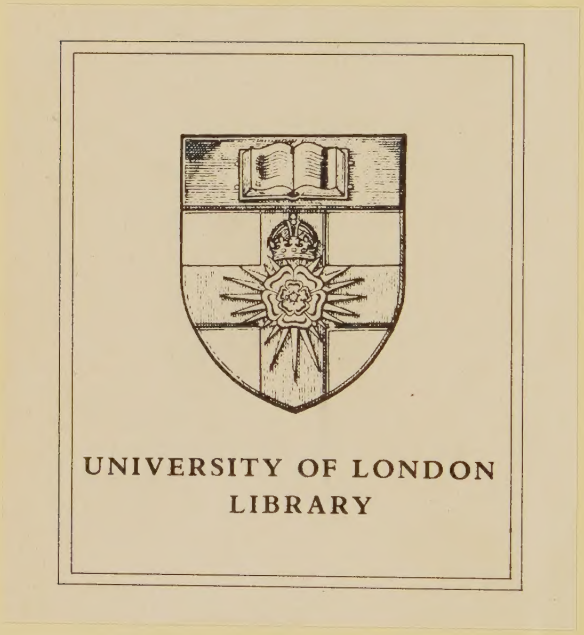

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THE IRISH REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE CHANCERY DIVISIONS

OF

THE HIGH COURTS OF JUSTICE

IN SOUTHERN AND IN NORTHERN IRELAND,

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURTS OF APPEAL

IN SOUTHERN AND IN NORTHERN IRELAND,

AND IN

THE HIGH COURT OF APPEAL FOR IRELAND.

EDITED BY

T. HENRY MAXWELL,

ONE OF HIS MAJESTY'S COUNSEL.

1922.

VOL. I.

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1922.

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At the University Press,

BY PONSONBY AND GIBBS.

Lord Chancellor.

THE RIGHT HON. SIR JOHN ROSS, BART.

Lords Justices of Appeal.

(IN SOUTHERN IRELAND.)

THE RIGHT HON. STEPHEN RONAN.

THE RIGHT HON. JAMES O'CONNOR.

(IN NORTHERN IRELAND.)

THE RIGHT HON. WILLIAM MOORE.

THE HON. JAMES ANDREWS.

Chancery Division.

(IN SOUTHERN IRELAND.)

THE RIGHT HON. CHARLES A. O'CONNOR M.R.

THE RIGHT HON. JOHN BLAKE POWELL.

(IN NORTHERN IRELAND.)

THE HON. DANIEL MARTIN WILSON.

Land Judge.

THE HON. WILLIAM E. WYLIE.

Irish Land Commission: Judicial Commissioners.

THE HON. WILLIAM E. WYLIE.

THE HON. GERALD FITZGERALD.

Law Officer.

(IN SOUTHERN IRELAND.)

HUGH KENNEDY K.C.

Attorney-General.

(IN NORTHERN IRELAND.)

THE RIGHT HON. RICHARD BEST K.C.

[These Reports will be cited as follows :—[1922] 1 I. R.]

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Master of the Rolls,	Robert Rice,	Barrister-at-Law.
Mr. Justice Powell,	C. Norman Kough,	Barrister-at-Law.
Land Judge and Land Commission,	T. C. Tobias, Hector Hughes,	Barristers-at-law.
Courts in Northern Ireland,	M. G. Ellison,	Barrister-at-Law.

ERRATA.

On page 49, line 28, for "settled" read "granted".

" " 89, last line, for "execepant" read "merchant", and for reference note (2) read 62 J.P. 836.

MEMORANDUM.

The High Court of Appeal for Ireland established under the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), first sat on 15th December, 1921, and last sat on 5th December, 1922.

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CASES

DETERMINED BY

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THE HIGH COURT OF APPEAL FOR IRELAND.

1922.

In re KIERNAN, DECEASED: KIERNAN *v.* M'GAURAN.

Powell J.
1921.
March 18.
July 26.
Nov. 3.

Land Purchase Acts—Arrears of rent—3 Edw. 7, c. 37, s. 24, sub-s. 8—Sale by lunatic absolute owner—Claim by absolute owner for sum for arrears of rent.

The Irish Land Act, 1903 (3 Edw. 7, c. 37), sect. 24, sub-s. 8, provides that, on the sale of an estate where arrears of rent were due, a sum not exceeding one year's rent shall be paid out of the purchase-money to the person who would have been entitled to receive those arrears for his own use. The real estate of a lunatic absolute owner of an estate was sold to the tenants under the Act, arrears of rent being due.

Held, that no sum was payable under sect. 24, sub-s. 8, to the lunatic absolute owner, and that on his death intestate the entire purchase-money retained its character as real estate, and passed to his heir-at-law and not to his personal representative.

MEMORANDUM from the Chief Clerk in the Matter of the Administration of the estate of Thomas Kiernan, deceased, for the opinion of the Court as to whether Rose Anne M'Gauran, the defendant, as personal representative of Thomas Kiernan, a lunatic, whose lands were sold during his lunacy under the Land Purchase Acts and the purchase-money paid into Court to the credit of his lunacy matter in his lifetime, was

Powell J. 1921.

KIERNAN v. M'GAURAN.

entitled under sect. 24, sub-s. 8, of the Irish Land Act, 1903, to claim out of the said purchase-money an amount equivalent to one year's rent, in respect of the lands so sold, on which there were arrears of rent at the date of the purchase agreement.

Thomas Kiernan was by order of the Lord Chancellor, dated 1st May, 1909, declared to be a person of unsound mind, and by order of the Lord Chancellor of the 8th July, 1910, it was declared that it would be just and reasonable and for the benefit of the lunatic that the lands specified in paragraph 1 of the report therein referred to should be sold on the terms and subject to the provisions in the said report specified.

In pursuance of this order, proceedings for the sale of the estate were instituted under the provisions of the Irish Land Purchase Acts, 1903 and 1909.

Thomas Kiernan died on the 23rd December, 1914. The first allocation of purchase-money that took place after his death was the allocation carried out on the 15th June, 1916, on which date the purchase-moneys of portions of the lands comprised in the estate, which were vested in the tenants in 1913, were distributed. On the final schedule claims in respect of arrears of rent under sect. 24, sub-s. 8, and in respect of interest on the purchase-money under sect. 24, sub-ss. 2 and 3, of the Irish Land Act of 1903, were inserted on behalf of the defendant as administratrix of the lunatic. The amount of the claim for arrears of rent and interest was admitted by Mr. Justice Wylie, and the amount paid to the defendant as administratrix, and the residue transferred to the plaintiff as heir-at-law of Thomas Kiernan.

By order of this Court, dated 22nd February, 1916, which was an order made on consent, it was directed (inter alia) that a sum of £1,100 Guaranteed 3 per Cent. Land Stock, portion of the real estate of the deceased lunatic, should be retained to the credit of this suit, subject to the claims of the defendant specified in the schedule to a consent dated 15th February, 1916. The first of the claims specified in the consent was a claim for arrears of rent, amounting to a sum of £378 16*s.* 7*d.*, in respect of portions of the lands comprised in the estate. At the date of the commencement of the sales of the properties the vendor, who was absolute owner of the property for sale, was a person of unsound mind under the control of the Lord Chancellor. By reason of the fact that he was absolute owner no claim was made under the provisions of sect. 24, sub-s. 8, of the Irish Land Act, 1903; but after his death it was ascertained that he had not made a will, and it therefore became necessary to segregate his real estate from his personal estate.

Devitt, for the heir-at-law.

Newett, for the personal representative.

Phelps, for the next-of-kin.

Cur. adv. vult.

Powell J.
1921.
KIERNAN
v.
M'GAURAN.
Nov. 3.

POWELL J. (having stated the facts as above) :—

The question which I have to determine is whether, out of the purchase-moneys of the lands distributed and allocated to the lunatic's estate during the lifetime of the lunatic, the defendant is now entitled, as personal representative of the lunatic, to an amount equivalent to one year's rent under sect. 24, sub-s. 8, of the Irish Land Act, 1903. That sub-section is as follows :—"In the case of the sale of an estate, where at the date hereinafter mentioned [which, in the case of an estate purchased by the Land Commission, is the date of the agreement for the purchase] arrears of rent were due in respect of any holding on the estate, a sum equivalent in amount to those arrears, but not exceeding in any case one year's rent, shall be paid out of the purchase-money to the person who would have been entitled to receive those arrears for his own use."

The sale of the lunatic's estate, I take it, was made in pursuance of sect. 26 of the Act of 1903, which provides that where a person who would otherwise be entitled to sell lands under the Land Purchase Acts is a lunatic, the Lord Chancellor may order the lands to be sold as if the sale was required for one of the purposes mentioned in sect. 63 of the Lunacy Regulation (Ireland) Act, 1871, and that that section shall apply accordingly, that is to say, that the Lord Chancellor may order the lunatic's lands to be sold under the provisions of the Land Purchase Acts, notwithstanding that the sale was not required for one of the purposes mentioned, but as if it were so required. Sect. 26 of the Act of 1903 has not, in my opinion, the effect of changing the quality of the lunatic's estate. That can only take place on the sale of the real estate of a lunatic, where it is for the benefit of the lunatic, or where the change occurs in the ordinary course of management. It is laid down in numerous authorities that the quality of a lunatic's estate will not, if possible, be changed during the continuance of his disability.

In *Attorney-General* v. *Marquis of Ailesbury* (1) Lord Macnaughten, at p. 688, says : "The principles on which the Court acts in dealing with the property of lunatics under its care are not open to question. The leading principle, the paramount consideration, is the interest of the lunatic. Consistently with that principle it is settled that in the ordinary course of managing a lunatic's estate the Court pays no regard to the interests or expectations of those who may come after ; but it is equally well settled that in matters outside the ordinary course of management it is the duty of the Court, as far as may be possible, not to alter the character of the lunatic's property, or to interfere with any rights of succession."

"If a lunatic recovers he may reasonably expect to find his property in the same state as when he became of unsound mind. This and not the interest of the persons to become entitled after his death is the true reason of the rule" (Pope on Lunacy). No act was done here by the Lord Chancellor, or by any other person, as far as I know, with any intention, for the purpose of management or otherwise, of converting the proceeds of these lands into personal estate,

(1) 12 A. C. 672.

Powell J. 1921.

KIERNAN v. M'GAURAN.

and, in my opinion, there was no conversion. Therefore the sum which I have to deal with is part of the price of the lunatic's estate, allocated to the lunatic's estate, and remaining real estate; and the question is whether, by the force of sub-s. 8 of sect. 24 a sum equivalent to one year's rent of the arrears, namely, £378 16*s.* 7*d.*, is now the property of the personal representative of the lunatic, or is the property of the heir-at-law. This sub-section has been considered in a number of cases. In *In re Crosbie's Estate* (1) Lord Chancellor Walker (at p. 130) says: "The object, prima facie, of that sub-section [that is, sub-s. 8] was to give an inducement to a tenant for life to sell, discharged of arrears by force of the agreement, by giving him [i.e., the tenant for life] a charge on the purchase-money for one year's arrears." And Lord Justice Holmes (at p. 138) says: "This provision is made in the interests of a limited owner entitled to arrears of rent at the date of the agreement. If these arrears, as well as the lands, had been bought by the purchase-money, it would be just to declare him entitled to so much thereof as represented the price of the arrears, and the sub-section, I think, can only be accounted for on this assumption."

In *In re Bandon's Estate* (2), at page 130, Lord Justice FitzGibbon says: "At the distribution of the purchase-money the tenant is out of the case, and whether arrears of rent are to be segregated from the capital price of the land is merely a question between one pocket and the other of a vendor who is an absolute owner, though it may be material between him and encumbrancers in some cases, and it is certainly material between him and remaindermen where he is limited owner." Section 24, he says, comes in for the distribution of the purchase-money only. It is mandatory, in so far as it directs that where it applies there shall be paid out of the purchase-money arrears of rent due in respect of the holding, not exceeding one year's rent. And at page 131 he says: "Knowing that arrears of rent existed, and seeing that limited owners, if they sold, would have to discharge them, Parliament gave a limited right to treat part of the purchase-money as being the price of income, and so far as Parliament has sanctioned it a limited owner who sells the land for a certain sum may treat the purchase-money as representing the income released as distinct from the lands sold." And later, on the same page, he says: "The provision is made, so far as it extends, for converting what, prima facie, is capital into income, and giving it to the owner of the rents and profits towards recouping him for his loss in accepting a capital price for the estate which satisfies all his claims for rent due or accruing." The language of the learned Lord Justice at page 130 may be taken to be an indication that even in the case of an absolute owner the sub-section may operate for some purposes as between him and an encumbrancer, but in my opinion this does not affect the question before me. Holmes L.J., at page 133, says: "Sub-section 8 seems to be intended in certain cases to give some compensation out of the purchase-money to a vendor who, by entering into the agreement to sell, has been deprived of a right which he would otherwise possess; but the compensation is confined to an amount of arrears of rent not exceeding in any case one year's rent."

(1) [1907] 1 I. R. 116.

(2) [1908] 1 I. R. 120.

In *In re Viscount Ashbrook's Estate* (1), Mr. Justice Wylie, at page 159, says: "In effect, though not in terms, this sub-section only applies where the estate sold is settled land, because if the vendor were an owner in fee there would not appear to be any reason for distinguishing that portion of the purchase-money representing added arrears from the rest of the purchase-money." He deals then with the practice under this sub-section as applied to settled land, and at page 160 says: "That practice is based on this assumption, that the sum added for arrears, though part of the purchase-money, continued, by force of sub-s. 8, to be the property of the person entitled to the arrears at the date of the agreement for sale, subject to such outgoings or charges as he was bound to pay out of them." And at page 160 he says: "The large proportion of the land in Ireland being in settlement, and the vendor being only tenant for life, the addition of arrears to the purchase-money did not meet the difficulty in such cases, the effect being to make the added arrears the property of the remainderman, the vendor only getting the interest upon it during his life. It seems to me, therefore, that sub-s. 8 of sect. 24 was plainly intended to remedy this injustice in the case of settled land by preserving the property of the tenant for life in the sum added for arrears, notwithstanding that by the agreement it is made part of the purchase-money; and the only equitable basis that I can conceive for the enactment contained in this sub-section is the assumption that arrears of rent due at the date of the agreement, which were the property of the tenant for life, were added to the purchase-money, and were to remain his property, and were to be paid to him on allocation."

Mr. Justice Wylie's decision in the case just quoted was affirmed by the Court of Appeal, Lord Chancellor Walker, at page 160, saying: "When we see what is done by that sub-section [that is, sub-s. 8] the whole difficulty is solved. The date is the date of the agreement for the purchase of the holding. It is immaterial whether the arrears of rent are added or not. Once the price is fixed by the purchase-agreement, the right of the person to whom the arrears are due would equally arise. What is that? Is it not a charge, i.e., a charge in favour of the person to whom the arrears are due, fixed and declared by law as of the date of the agreement for the purchase, but payment of which is deferred till allocation?" And FitzGibbon L.J. says: "The sub-section provides that where at the date of the agreement for purchase arrears of rent were due, a sum equivalent to those arrears, but not exceeding one year's rent, shall be paid out of the purchase-money to the person who would have been entitled to receive those arrears, for his own use; that sum, if the sale is carried out, will on allocation be paid to him having been from the date of the agreement the money of the owner of the arrears."

It would appear to me, having regard to the scope and meaning of this sub-section, as declared by the learned Judges in the cases referred to, that the lunatic here being an absolute owner and entitled as absolute owner to any arrears of rent due at the date mentioned in the sub-section, namely, the date of the agreement for the purchase, and as the sum claimed here is part of the purchase price of his estate as absolute owner, which when the time came for

(1) [1909] 1 I. R. 157.

Powell J. 1921.

KIERNAN v. M'GAURAN.

the distribution of the purchase-money was allocated to him and lodged to the credit of his lunacy matter, no other person can have any right to the arrears mentioned in sub-s. 8; and that, as Lord Justice FitzGibbon said in *In re Bandon's Estate* (1), when sect. 24 is reached at the distribution of this purchase-money, the question whether arrears of rent were to be segregated from the capital price of the land was merely a question between one pocket and the other of a vendor who was absolute owner. Mr. Fottrell says in his affidavit that it was by reason of the fact that he was an absolute owner that it was unnecessary to make a claim under the provisions of sect. 24, sub-s. 8, of the Irish Land Act of 1903. But it appears to me that if such a claim had then been made it could not have been maintained, because, the vendor being an absolute owner, it was merely a question between one of his pockets and the other. If, being an absolute owner, Thomas Kiernan was of sound mind and had received the entire purchase-money, who could have claimed this one year's arrears of rent under the sub-section? No one. Does it make any difference in point of law that the money, instead of being paid direct to the absolute owner, was lodged to the credit of his lunacy matter for his benefit? Furthermore, the entire sums so allocated during his lifetime to the credit of the lunacy matter, by reason of there being no conversion, retain the quality of real estate. At his death it is of the same quality as real estate, and is, in my opinion, unaffected by sub-s. 8 of sect. 24, which in the circumstances does not apply.

A decision of the present Lord Chancellor in *In re Ferrall's Estate* (2) was relied upon. There it was held that where upon the sale of a settled estate through the Irish Land Commission arrears of rent were due to the vendor tenant for life at the date of the purchase agreements, the sum payable in respect of those arrears under sect. 24, sub-s. 8, of the Irish Land Act, 1903, was a sum earmarked and distinct from the rest of the purchase-money, and was payable to the vendor, notwithstanding that the rest of the purchase-money was insufficient to meet the claims of encumbrancers thereon. In that case the present Lord Chancellor (Sir John Ross) said:—"There are several cases dealing with the application of the sub-section as between tenants for life and remaindermen. In this case the question arises as between a tenant for life and a mortgagee on the inheritance. Up to the present it has always been the practice to place on the allocation schedule the claim under this sub-section in priority to all other claims; that is to say, a sum equivalent to the arrears of rent due in respect of any holding, but not exceeding in any case one year's rent. It must, according to the sub-section, be due at the date of the agreement for purchase, and it must be paid to the person who would have been entitled to receive those arrears for his own use. . . . It is hardly necessary for me to point out, as has been done in other cases, that the great object of the Act of 1903 was to facilitate sales. The question of arrears was always the great obstruction. It was enacted by prior Acts that all arrears due at the date of the agreement must be wiped out. The landlord, as a general rule, could not afford to abandon his arrears; therefore no sale could take place. The only way to get over the difficulty was to add the

(1) [1908] 1 I. R. 120. (2) [1913] 1 I. R. 17.

arrears to the purchase-money. This was, however, very unfair to the tenant for life; the added arrears became the property of the remainderman. The tenant for life only received the interest for his life. It was to remedy this that the sub-section was inserted, and a sum equivalent to one year's rent is added to the purchase-money, but continues to be the property of the tenant for life, and must be paid to him on the distribution of the purchase-money. . . . In order to effect a sale, which is supposed to be for the benefit of everybody—vendor, tenant, encumbrancer, and remainderman—the vendor gives up his right to his arrears. He gets in exchange a part of the purchase-money earmarked for the purpose, and distinct from the rest of the purchase-money. The compensation is limited to an amount not exceeding a year's rent."

The learned Lord Chancellor was dealing with a case of a tenant for life and remainderman, but I cannot see how any part of the purchase-money with which I am dealing, which was actually allocated to the lunatic, an absolute owner, and which retains the quality of real estate, was earmarked distinct from the rest of the purchase-money as compensation for somebody else. There is no tenant for life here to whom an arrear equivalent to one year's rent is earmarked for the purpose of and distinct from the rest of the purchase-money by way of compensation, because the lunatic was entitled both to the estate and the arrears, and the purchase-money is real estate.

It remains to be noticed that Mr. Fottrell, in paragraph 5 of his affidavit, submits that the fact that on the first allocation that took place after the death of the lunatic, namely, the allocation carried out on the 15th June, 1916, on Final Schedule 5182, a claim was put forward under the section in respect of arrears due at the date of the sale of the lands by the personal representative, and that the claim was admitted by the Judge of the Irish Land Commission, establishes the principle that, notwithstanding the fact that at the date of the sale the lunatic was absolute owner, this claim was admissible.

It does not appear whether the matter was argued before Mr. Justice Wylie, and I do not think his order concludes the question which I have to determine. I am dealing in the present case with a claim made under this section in respect of moneys actually distributed and allocated during the lifetime of the lunatic, the entire of which, as it appears to me, represented the real estate to which the lunatic was absolutely entitled. Mr. Fottrell in his affidavit says that upon this allocation it was unnecessary to make a claim under the provisions of the section by reason of the fact that the lunatic was absolute owner; but I do not think, as I have said, that the claim could have been successfully made then, and, for the reasons which I have stated, I am of opinion that it cannot be successfully made now.

Solicitors for the heir-at-law: *Sheridan & Kenny.*
Solicitor for the next-of-kin: *A. Lane Joynt.*
Solicitors for the personal representative: *G. D. Fottrell & Sons.*

D. M. S.

Appeal.
(*S. I.*)
1921.

Dec. 7.

MARY JOSEPHINE O'LEARY *v.* JOHN O'DEA (1).

(1919. No. 318.)

Registration of title—Death intestate of unregistered owner of freehold—Order of Court directing personal representative to be registered as owner—Objection by registering authority—Application by personal representative—Local Registration of Title (Ireland) Act, 1891 (54 & 55 *Vict. c.* 66), *sect.* 16.—*Alteration by Court of an earlier order—Jurisdiction.*

A bought his holding under the Land Purchase Acts, and it was vested in him in fee on November 3rd, 1891. He conveyed it to B on May 23rd, 1893; and on June 1st, 1908, A died intestate. On July 20th, 1908, B was registered as owner of the lands under the Local Registration of Title (Ireland) Act, 1891. C, a daughter of A, took out administration to her father. In an action brought by C, as personal representative, against B, the conveyance of 1893 was set aside; and by an order dated June 17th, 1910, the then Master of the Rolls directed that the register should be rectified by substituting the name of the personal representative of A for that of B. The local Registrar of Titles declined to register the personal representative on the ground that on the death of A intestate the lands were freehold property. An application was made by C on December 1st, 1921, to the Master of the Rolls for an order to rectify the register by substituting her name for that of B as registered owner. The Master of the Rolls refused the motion on the ground that the lands were the freehold property of A, and that they descended on his death intestate to his heir-at-law, and not to his personal representative.

Held (affirming the Master of the Rolls), that it was not competent for the learned Judge to make the order applied for, and that the order he had made should be varied by striking out the part declaring that the lands descended to the heir-at-law, and not to the personal representative, and by declaring that the Court had no jurisdiction to make the order sought.

Per O'Connor L.J.:—Sect. 16 of the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), does not confer jurisdiction on any Court to alter its own substantial decision, and to substitute an entirely new decision for it.

Ex parte Appeal from an order of the Master of the Rolls dated December 1st, 1921, refusing a motion by Mary Josephine Fallon, the legal personal representative of Thomas O'Leary, deceased, asking that the Registrar of Titles, under the Local Registration of Title (Ireland) Act, 1891, should be directed to rectify the register kept, pursuant to that Act, by substituting in folio 5,507, for the County of Galway, the name of the plaintiff as registered owner of the lands in lieu of the name of the defendant.

Thomas O'Leary, a tenant-farmer in County Galway, purchased his holding under the provisions of the Land Law (Ireland) Act, 1881, and the usual conveyance and charging order were made by the Irish Land Commission on November 3rd, 1891.

On May 23rd, 1893, Thomas O'Leary conveyed the lands to John O'Dea, the defendant. On June 1st, 1908, O'Leary died intestate and a widower, leaving him surviving three lawful children, James O'Leary, his eldest son, Stephen O'Leary, and Mary Josephine O'Leary, the plaintiff, now Mrs. Fallon.

(1) Before Ronan and O'Connor L JJ., and Dodd J.

On July 20th, 1908, the defendant was registered as owner in fee-simple of the lands; on March 19th, 1909, letters of administration of the personal estate of Thomas O'Leary were granted to the plaintiff. Shortly afterwards she instituted an action as personal representative of her father, claiming to have the conveyance of May 23rd, 1893, to the defendant set aside on the ground of undue influence and fraud.

On June 17th, 1910, the then Master of the Rolls made an order setting aside the said conveyance, and directing that the register be rectified by substituting the name of the plaintiff, as personal representative of Thomas O'Leary, for that of the defendant as owner of the lands; and that, if considered necessary by the Registrar of Titles, the defendant should execute a transfer of the lands to the plaintiff. In compliance with that order, possession was forthwith delivered to the plaintiff, and she had been since in possession.

In February, 1911, plaintiff's solicitor forwarded to the local Registrar of Titles an application to have her name entered on the folio in pursuance of the order of June 17th, 1910. The Examiner of Titles wrote asking for the name of the heir-at-law of Thomas O'Leary, and in reply the solicitor informed him that James O'Leary was the heir-at-law. Nothing further was done in the matter until in or about November 12th, 1918, when the Examiner again wrote asking if anything had been done with a view to having the beneficial owner registered.

Ultimately, in the month of September, 1921, plaintiff's solicitor lodged an application for registration, and on September 15th the local Registrar of Titles wrote to him stating that at the date of the assignment of 1893, and at the date of the death of Thomas O'Leary, the lands were freehold property, and therefore would not vest in his personal representative, and that in the opinion of the Registrar the order made on June 17th, 1910, should be varied so as to direct the register to be rectified by substituting the name of the heir-at-law for that of John O'Dea, and verbally he suggested that the matter should be brought before the Master of the Rolls. An application was made to have the plaintiff registered as owner. The Master of the Rolls refused that application on the ground that "it appearing to this Court that the said lands were the freehold property of the said Thomas O'Leary, deceased, and that the same descended on his death intestate to his heir-at-law, and not to the plaintiff as his legal personal representative, this Court doth refuse the said motion, with liberty to the said applicant to bring the said heir-at-law of the said Thomas O'Leary, deceased, before this Court."

Jellett K.C. and *M. John Ryan*, for the plaintiff:—

We submit that the order made by the Master of the Rolls in 1910 is conclusive. Under sect. 16, sub-s. 1, of the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), the several registering authorities shall obey the order of any competent Court in relation to any registered land on being served with the order or an official copy thereof. The registering authority may apply to the Court by which the order has been made either to vary the order or to give directions as to the mode in which it is to be obeyed; and according to Rule 7 of

Appeal. (*S. I.*) 1921.

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the Orders and Rules of 1910 made under the Local Registration of Title (Ireland) Act, 1891, the Registrar shall state in writing his reasons for considering that the order should be varied or directions given, and shall direct by whom such application is to be made to the Court. Since the passing of the Judicature Act of 1877 the High Court has no jurisdiction to review its own order on the ground of error in law, apparent on the face of it, the remedy of the party complaining being by appeal to the Court of Appeal: *Charles Bright & Co., Ltd.*, v. *Sellor* (1).

RONAN L.J.:—

The order of the Master of the Rolls must be varied by striking out the words, "that the said lands were the freehold property of the said Thomas O'Leary, deceased, and that the same descended on his death intestate to his heir-at-law, and not to the plaintiff as his personal representative," and substituting therefor the words, "that the Court has no jurisdiction to make the order sought." This motion must be refused.

O'CONNOR L.J.:—

The facts of this case have been clearly stated by Mr. Jellett. A man named Thomas O'Leary, having purchased his farm under one or other of the Irish Land Purchase Acts, had the lands vested in him in fee-simple by a conveyance dated 3rd November, 1891. On the 23rd May, 1893, Thomas O'Leary conveyed the lands to one John O'Dea. On the 1st June, 1908, Thomas O'Leary died intestate, leaving him surviving his eldest son and heir-at-law, James, and two other children, Stephen and Mary Josephine. On the 20th July, 1908, John O'Dea was registered as owner of the lands under the Local Registration of Title Act. In 1909 Mary Josephine O'Leary took out administration to her father, and in the same year, in her character of personal representative of her father, took an action against John O'Dea to have the conveyance to him of the 23rd May, 1893, set aside.

A curious thing happened. It does not seem to have occurred to the plaintiff's advisers, to the defendant's advisers, or to the learned Judge (the then Master of the Rolls) that the personal representative had, as Mr. Jellett admits, no title to these lands at all. The lands were not registered until after the death of Thomas O'Leary; and, therefore, any interest he had in them was a freehold and descendible as freehold, for sect. 84 of the Local Registration of Title Act applies only to registered land. Notwithstanding this, a decree was made in the action setting aside the conveyance of the 23rd May, 1893, and directing that the lands should be registered in the name of Mary Josephine O'Leary.

An application has now been made to register Mary Josephine O'Leary as owner. The Local Registrar raised the difficulty as to the title suggested by the facts I have mentioned, and in a letter to the applicant's solicitor dated 15th September, 1921, expressed the opinion that the decree would have to be varied so as to direct the register

(1) [1904] 1 K. B. 6.

to be rectified by substituting the name of the heir-at-law of Thomas O'Leary for the name of John O'Dea; and he also said that even if the lands devolved as personalty, a personal representative could not be registered as owner in that capacity. We are told by counsel that the Registrar verbally suggested that the matter should be brought before the Master of the Rolls. It was brought before the Master of the Rolls, who was asked to direct the Registrar to register Mary Josephine O'Leary (or Fallon, as she now is). This the Master of the Rolls declined to do, but gave liberty to the appellant, if so advised, to bring Thomas O'Leary's heir-at-law before the Court. From this order the appeal is brought.

Now, I am of opinion that the Master of the Rolls has no jurisdiction to entertain this application, whether the heir-at-law is before the Court or not. His jurisdiction is conferred by sect. 16 of the Local Registration of Title Act, which is as follows:—

"1. The several registering authorities shall obey the order of any competent Court in relation to any registered land on being served with the order or an official copy thereof.

"2. A registering authority may, where he considers it necessary, apply in the prescribed manner to the Court which has made such order, either to vary the same, or to give directions as to the mode in which it is to be obeyed; and thereupon the Court, after such notice, if any, as it may direct, may vary such order in such manner or make such new order as it may think fit."

In the first place, I doubt very much if sect. 16, sub-s. 2, has any reference to a case of this kind at all; it is a mere machinery section, as I am at present inclined to think, framed to get over difficulties arising from a decision of the Court, and to aid that decision; it seems to me, as at present advised, to confer no jurisdiction on any Court to alter its own substantial decision in the case and to substitute an entirely new decision for it.

In the second place, the application must be by the Registrar; and, though Rule 7 of the rules made under the Local Registration of Title Act is very wide in its terms, and purports to give power to the Registrar to direct any person to make the application to the Court, no such direction has been given here, and, indeed, this application is quite other than what the Registrar would have either wished or directed.

I am therefore of opinion that the appeal should be dismissed, but that the order should be amended so as to show that the refusal is based upon the ground that there was no jurisdiction to make it.

I express no opinion as to the propriety of the action of the Registrar; it may be that the applicant can appeal to Mr. Justice Wylie from the Registrar's ruling, but I am clear she has taken the wrong course in going before the Master of the Rolls in the circumstances told to us.

DODD J. concurred.

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The Court made the following order: "It is ordered that, subject to the variation hereinafter mentioned, the said order of the Master of the Rolls do stand affirmed (this Court being of opinion that from want of jurisdiction it was not competent for the said learned Judge to make the order applied for), that is to say, by omitting therefrom after the words, 'and it appearing to this Court,' the words, 'that the said lands were the freehold property of the said Thomas O'Leary, deceased, and that the same descended on his death intestate to his heir-at-law, and not to the plaintiff as his personal representative,' and substituting therefor the words, 'that the Court has not jurisdiction to make the order sought'; and it is accordingly ordered that this motion do stand refused."

Solicitor for the appellant: *M. P. Kearney.*

C. L.

IN RE THE RATHMINES AND RATHGAR IMPROVEMENT COMMISSIONERS AND FIELD.

(1920. No. 144.)

Powell J.
1921.
July 5.

Solicitor—Costs—Taxation—"Drawing documents"—Case for opinion of counsel—General Order under Solicitors' Remuneration Act, 1881, Sched. II.

Drawing a case for counsel in contemplation of litigation comes within the expression "drawing . . . other documents" in Schedule II of the General Order, 1884, made in pursuance of the Solicitors' Remuneration Act, 1881, and is properly charged for at 2*s.* a folio.

In re Mahon, [1893] 1 Ch. 507, and *In re R. P. Morgan & Co.*, [1915] 1 Ch. 182, followed.

SUMMONS TO REVIEW TAXATION.

Alexander Field lodged objections to the Taxing Master's partial disallowance of certain items in a bill of costs relating to the matter of the Rathmines and Rathgar Improvement Commissioners and credit of Patrick Field, and all other persons interested in all that and those the plot of ground, with the house and sheds thereon, situate at Ranelagh Road and Cullenswood Avenue, in the parish of St Peter, Barony of Upper Cross, and County of Dublin. The objections were in respect of items 24 and 26, which dealt with a case submitted to counsel to advise on the construction of the will of Eliza Butler, under whose will the property in question was disposed of. Alexander Field's contention before the Taxing Master was that the items in question came within Schedule II of the General Order, 1884, made in pursuance of the Solicitors' Remuneration Act of 1881. It was submitted that the case for the opinion of counsel represented by the items was an ordinary case, and that the solicitors were entitled to charge 2*s.* per folio for drawing the case, and 8*d.* per folio for engrossing the same; and that the case not being an extraordinary case within the meaning of the schedule, the Taxing Master had no discretionary power to increase or diminish the authorized charge.

The ruling of the Taxing Master on the objections was as follows:—"I overrule the objections, as, in my opinion, I am bound by the decision of the Master of the Rolls in *In re O'Hagan* (1). Were it not for this decision, I would, having regard to the changed practice of the Taxing Masters in England, and the decisions hereinafter referred to, be disposed to allow the fee as charged. The case for counsel charged for is one carefully drawn, dealing with conveyancing and questions of title, and, in my opinion, requiring considerable skill and attention. It has been pressed on me that in *In re O'Hagan* (1) has from time to time been differed from both by Judges in this country and in England, and I was referred to the following cases:—In Ireland, *Todd and Mark* v. *M'Kinlay* (2), in which the late Chief Baron held

(1) 19 L. R. Ir. 100.

(2) 40 I. L. T. R. 199.

Powell J. 1921.

In re Rathmines & Rathgar Improvement Commrs. and Field.

that conditions of sale were chargeable for under Schedule II. It appears from the correspondence the Master of the Rolls had with the Taxing Master in England that it was their practice at that time to tax costs of cases for counsel under the old schedule, and not under Schedule II, but after the decision of *In re Mahon* (1) they changed their practice, and they from that date have taxed the costs of cases for counsel under Schedule II. This practice has been approved of by Mr. Justice Neville as late as 1914 in *In re R. P. Morgan and Co.* (2)."

Devitt, for Alexander Field.

Dockrell, for the Rathmines and Rathgar Urban District Council.

Powell J.:—

It appears from the cases cited in the Taxing Master's rulings that the practice in England has been completely changed by the two decisions *In re Mahon* (1) and *In re R. P. Morgan & Co.* (2). In the latter case Neville J., a most careful Judge, held that drawing a case for counsel in contemplation of litigation comes within the expression "other business" in Rule 2 of the General Order, Solicitors' Remuneration Act, 1881, and, being a "document" within Schedule II thereto, was properly charged for at 2*s.* a folio. I am bound to say that I agree with him. I am glad to be able to follow the later decisions. In my opinion a case to counsel is a "document." It is often the most important document in the whole gamut of the litigation for the client, and I think that solicitors should be fairly remunerated. That is my own view, and having regard to the later decisions and the change of practice in England, I am of opinion that the ruling of the Taxing Master should be overruled.

Solicitors for Alexander Field: *J. H. Walsh & Co.*

Solicitors for Rathmines and Rathgar Urban District Council: *D. & T. FitzGerald.*

D. M. S.

(1) [1893] 1 Ch. 507.

(2) [1915] 1 Ch. 182.

MUNSTER AND LEINSTER BANK, PLAINTIFFS, *v.* MUNSTER MOTOR COMPANY, LIMITED, AND ANOTHER, DEFENDANTS (1).

Powell J.
1922.
Jan. 16.
Feb. 1.

Practice—Sale by order of the Court—Private tender—Reopening sale after acceptance of tender.

Where a private tender for the purchase of property sold by order of the Court has been accepted, the principles applicable to reopening biddings on a sale by auction by order of the Court will be followed.

MOTION to vary order of the Court directing a sale.

The plaintiffs, the Munster and Leinster Bank, brought an action in the Chancery Division against the defendants, the Munster Motor Company, Limited, to have a debenture, issued to the bank by the company on the 2nd February, 1921, declared a charge on the undertaking and property of the company, for the usual accounts, and for the appointment of a receiver and sale. The Goodyear Tyre and Rubber Company, Ltd., were joined as defendants as unsecured creditors. The action came on for hearing before Powell J. on the 28th July, 1921, when, there being no appearance for the defendants, judgment was given for the plaintiffs, with the provision that the parties were at liberty to apply to the Vacation Judge as there might be occasion.

On the 21st September, 1921, an application was made to Dodd J. sitting as Vacation Judge for the acceptance of an offer of £12,500 made for the purchase of the undertaking and property of the defendant company by a Miss Murphy, and guaranteed by a Mr. Woodhead, who claimed to hold a judgment mortgage on the leasehold property of the defendant company. The application was grounded upon the affidavit of Mr. Olden, the receiver, in which it was stated that the debts due by the company were £11,763 4*s.* 1*d.* due to plaintiffs, £5,000 due to Mr. Woodhead, and £2,788 14*s.* 2*d.* due to trade creditors. The valuation of the property and assets was calculated as £10,999 9*s.* Mr. Olden stated that although the offer would not clear off all the liabilities of the defendant company, it was not probable any larger sum would be obtained by any other means of realization, and that, owing to the dampness and situation of the company's factory, the stock was fast deteriorating. Dodd J. accepted the offer, but the order was never made up, and on the 10th October, 1921, Miss Murphy withdrew her offer and Mr. Woodhead his guarantee.

On the 7th December, 1921, Messrs. Byrne and O'Mahony made to the receiver an offer to purchase the property and undertaking of the defendant company for the sum of £11,500, and on the 12th December, 1921, counsel applied to Powell J. for leave to serve notice of motion for the 14th December for liberty to the receiver to accept this offer. The notice was served on the Goodyear Tyre and Rubber Co., Ltd., and Mr. Woodhead.

On the 14th December, 1921, the application was made to Powell J. for an order for sale and for acceptance of the proposal by Messrs.

(1) Before POWELL J.

Powell J.
1922.
MUNSTER BANK v. MUNSTER MOTOR CO.

Byrne and O'Mahony. The motion was grounded on the affidavit of Mr. Olden, who referred to his previous affidavit, and stated that since September the value of the stock had much deteriorated, and that the offer of £11,500 was, in his opinion, exceedingly good. Counsel, who moved, stated that since the motion was instituted an offer of £12,500 had been made to the receiver by Mr. Woodhead. A representative of Mr. Woodhead's solicitors informed the Court that Mr. Rearden had been instructed to appear for Mr. Woodhead, but was unable to attend owing to his being professionally engaged at Green Street Courthouse. No information was given as to Mr. Rearden's instructions, nor was application made for an adjournment to secure his attendance. Mr. Woodhead, solicitor for Messrs. Byrne and O'Mahony, informed the Court that his clients were prepared to increase their offer to £12,700 on condition of immediate acceptance. Counsel for the creditors being of opinion that this increased offer should be accepted, an order was then made for the sale of the property and undertaking of the defendant company to Messrs. Byrne and O'Mahony for £12,700, on condition that one-fourth of the purchase-money was lodged in Court.

On the 21st December, 1921, Mr. Rearden mentioned the matter by leave of the Court, and stated that the Cork solicitors acting for Mr. Woodhead had sent him a brief by post on the 13th December, but that this brief had not reached him on the 14th, before he left his private address, and that a duplicate brief, sent by the Cork solicitors to their Dublin agents, had not been delivered to him, owing to his absence at Green Street Courthouse. Powell J. suggested that the matter should be brought up on motion, and accordingly on the 9th January, 1922, notice of the motion, the subject of this report, was served by Mr. Woodhead on the other parties.

The motion was to set aside or vary the order of the 14th December, 1921, in so far as it directed that the offer of £12,700, made by John N. Byrne and P. J. O'Mahony, for the purchase of the property and assets of the defendant company be accepted, and that in lieu thereof it be ordered that the offer of Mr. Woodhead, dated 19th December, 1921, for the purchase of the said property and assets at the price of £15,000 be accepted.

The notice was grounded upon the affidavit of Mr. Woodhead, in which the following averments were made:—That for five weeks after his offer had been made in September, 1921, neither he nor Miss Murphy had heard from the receiver, and in the meantime he, Mr. Woodhead, became aware that the receiver was collecting the rents, and was informed that pilfering was taking place, and the stock was deteriorating, and accordingly he and Miss Murphy withdrew their offer, intending to wait until public notice was given by the receiver of his intention to sell; that on the 8th December, 1921, Mr. Morrogh, solicitor for the plaintiffs, informed his (Mr. Woodhead's) solicitors of the proceedings taken by the plaintiffs, and that appearance was entered on his behalf on the 12th December, 1921, and that on the 13th Mr. Morrogh called at his solicitor's office and stated he had received a telegram from Dublin that an offer of £11,500 was to be submitted for the approval of the Court on the 14th. This was the first intimation received by Mr. Woodhead or his solicitors of the offer,

and his solicitors immediately telephoned to him, when he instructed them to oppose the offer, wrote to the receiver making an offer of £12,500, and instructed his solicitors to inform the Court that he was prepared to increase this offer. Mr. Woodhead further stated on information that his solicitors in Cork sent a brief by post to Mr. Rearden on the 13th December, and also a brief to their Dublin agents, to be handed to Mr. Rearden, and described how both these briefs were not in fact delivered to his counsel; that he was accordingly not represented at the hearing on the 14th December, and although his offer of £12,500 was mentioned to the Court, some doubt as to its genuineness appeared to have been raised, and the offer of £12,700 was accepted. On the 19th December, 1921, Mr. Woodhead made to the receiver an offer of £15,000.

Mr. Olden, in an affidavit in reply to Mr. Woodhead, stated he was not aware of any pilfering, and that the stock was cared for as far as possible; that he had tried to induce Mr. Woodhead to make an offer before the offer of £11,500 had been received, but that Mr. Woodhead stated if the property was put up for auction, it would probably only realize £7,000. Mr. Byrne, in an affidavit filed to oppose the motion, the subject of this report, set out the various steps taken by him and Mr. O'Mahony to make financial and other arrangements for the purchase.

Sect. 7 of the Sale of Land by Auction Act, 1867, 30 & 31 Vict. c. 48, provides:—"The practice of opening the biddings on any sale by auction of land under or by virtue of any order of the High Court of Chancery shall be discontinued, and the highest bona fide bidder at such sale, provided he shall have bid a sum equal to or higher than the reserved price (if any) shall be declared and allowed the purchaser, unless the Court or Judge shall, on the ground of fraud or improper conduct in the management of the sale, upon the application of any person interested in the land (such application to be made to the Court or Judge before the Chief Clerk's certificate of the result of the sale shall have become binding), either open the biddings, holding such bidder bound by his bidding, or discharge him from being the purchaser, and order the land to be resold upon such terms as to costs or otherwise as the Court or Judge shall think fit."

H. D. Conner K.C. and *Hewitt Poole*, for the plaintiffs.

A. Dickie K.C., for the Goodyear Tyre and Rubber Co., Ltd., and unsecured creditors.

H. Wilson K.C., for Messrs. Byrne and O'Mahony.

W. Norwood K.C. and *Rearden*, for Woodhead.

Cur. adv. vult.

POWELL J. (having stated the facts as hereinbefore set out), proceeded:—

Mr. Woodhead says in his affidavit that he instructed his solicitors to inform the Court that he was prepared to increase this offer if necessary. He does not indicate to what extent he was willing to increase the offer, and no statement to that effect was made to the

Powell J.
1922.

MUNSTER BANK *v.* MUNSTER MOTOR CO.

Court by the gentleman who represented him, nor was it suggested that Mr. Rearden's brief contained any such instructions, nor was any application made to me at the commencement of the motion, or when the offer of Mr. Byrne was increased to £12,700, to allow the case to stand for Mr. Rearden's attendance. No complaint was made to me that the notice was too short. What I had before me was evidence that the offer of £12,700 was an extremely good offer. This was apparent from the two affidavits of the receiver, in the earlier one of which he had stated that, having regard to the circumstances and to the depreciation of the property, £11,500—which was considerably over the valuation made—was a very good offer, and ought to have been accepted. I had before me in evidence that Miss Murphy's offer had been withdrawn, for reasons of which I had no evidence, and I am not now satisfied that the reasons given by Mr. Woodhead in his affidavit are well founded. I had the offer from Mr. Byrne of £11,500, which the receiver thought a good offer. I had that offer increased to an offer of £12,700, made by Mr. M'Dermott on the express condition that it should be at once accepted. The persons most interested in obtaining the highest possible price were Mr. Woodhead, who had offered £12,500, and the unsecured creditors, whose counsel thought that the offer of £12,700 ought to be accepted. I have now the additional evidence of Mr. Olden that Mr. Woodhead stated that he considered if the assets were put up for sale they would probably only fetch £7,000.

Mr. Rearden is in no way whatever to blame for what has happened. I quite accept his statement that the two briefs referred to miscarried, and that he had not received either of them when the motion was on before me, and that it was not possible to deliver to him the second or duplicated brief referred to; but, as I have stated, it was not suggested by the gentleman who appeared for Mr. Woodhead that he would increase his offer; it is not suggested now that Mr. Rearden had any instructions to increase the offer to any sum over the sum of £12,700. In all the circumstances I consider that I was not only justified in accepting, but bound to accept, the offer of £12,700.

The question is, should I now break faith with the purchasers? Mr. Wilson, who appeared on this motion for Mr. Byrne and Mr. O'Mahony, has referred me to the case of *In re Bartlett* (1). In that case, which was an administration suit, an estate was ordered to be sold by auction, but the reserve price not having been reached, the sale by auction became inoperative. A subsequent offer to purchase subject to the approval of the Court within ten days was carried in before the Chief Clerk, who approved of the offer, and ordered the contract to be carried out, whereupon a deposit was paid and the abstract delivered. Before the order had been passed and entered a much higher price was offered. Upon a summons to vary the Chief Clerk's certificate by setting aside the sale and directing the offer for the larger amount to be accepted, it was held that the certificate of the Chief Clerk, although not passed and entered, was tantamount to a confirmation of the contract, and that the principle of the Act 30 & 31 Vict. c. 48, sect. 7, by which the old practice of opening biddings on a sale by auction was discontinued, except upon the ground of fraud or

(1) 16 Ch. D. 561.

improper conduct, applied equally to a sale by private contract entered into under the sanction of the Court, and that such a contract could not be discharged where no unfairness existed.

It is not necessary to go into the facts of that case, which were fully gone into and dealt with by the learned Vice-Chancellor in his judgment. He refers to the Act 30 & 31 Vict. c. 48, and he says that before 1866, if there had been a sale by auction under the direction of the Court, the mere circumstance that a man had offered a larger sum would have been sufficient to cause the biddings to be opened. He says that that was a most pernicious practice; that it was unfair to the purchasers, and most prejudicial to the vendors. Although it was not a sale by auction, the Vice-Chancellor thought the principle of the statute clearly applicable to a sale by private contract entered into under the sanction of the Court of Chancery, and that a contract by the Court, once entered into, was not to be discharged except in most special circumstances, such as are specified in the Act of Parliament. He says the 7th section of the Act of Parliament provides that the practice of opening biddings on any sale by auction of land under or by virtue of any order of the Court of Chancery shall be discontinued, and the highest bona fide bidder at such sale, provided he shall have bid a sum equal to or higher than the reserve price (if any) shall be declared the purchaser, unless the Court or Judge shall, on the ground of fraud or improper conduct in the management of the sale, upon the application of any person interested in the land (such application to be made to the Court or Judge before the Chief Clerk's certificate of the result of the sale shall have become binding), either open the biddings or order the land to be resold. He says (at p. 570): "What I here say is that where there has been a sale by private contract under a decree of the Court, the principle of the Act of Parliament is applicable in the same way as on an application for opening biddings, and where a contract has been entered into and confirmed, I think this Court ought not to interfere."

In this case the offer of Mr. Byrne and Mr. O'Mahony was accepted by me in the circumstances that I have detailed, the offer having been made on the clear understanding that it should be at once accepted. It is my experience that it is a much better way to effect a sale of property such as this by getting proposals than by advertising for a public sale. I think Mr. Woodhead has demonstrated that this is so in the present case, because, apparently, his own view is that at an auction the property would only fetch £7,000. There has been no fraud or improper conduct in the management of this sale. I have great doubt whether, in these circumstances, I have any jurisdiction to set aside this order, but even if I had I would not feel justified in so doing. I think the Court is bound to keep faith with purchasers. People will not make proposals to the Court for the purchase of property if they cannot rely on the Court keeping faith with them. I cannot see my way to break faith in this case with Messrs. Byrne and O'Mahony, who made their increased offer on the distinct understanding that it was to be at once accepted.

Solicitors for the plaintiffs: *Maxwell, Weldon, & Co.*
Solicitors for the Goodyear Tyre and Rubber Company, Ltd.: *Porter, Morris, & Co.*
Solicitors for Messrs. Byrne and O'Mahony: *Mooney & Sons.*
Solicitors for Mr. Woodhead: *Barry, Galvin, & Son.*

C. N. K.

Powell J.
1922.
March 16.

HENRY CHAPMAN POULTER AND LAWRENCE J. WALDRON, PLAINTIFFS, *v.* CHARLES FITZIMON, EDITH M. C. LLOYD, AND WILMOT H. C. LLOYD, DEFENDANTS (1).

Practice—Fund in Court—Payment out—Presumption against possibility of issue—Policy of assurance against risk of birth of issue.

C. F. by settlement in 1901 settled a policy of assurance on his life upon trust as to one moiety for the issue of his daughter A. F. (then a spinster), and as to the other moiety on trust for the issue of another daughter M. F. (also a spinster), with remainder, in default of issue of the daughters, to himself absolutely, and subsequently mortgaged the policy to R., who assigned his interest to L. C. F. died intestate, and the two last-named defendants were executors of L., the mortgagee. In a suit to carry out the trusts of the settlement, the policy moneys were paid into Court, and the executors of L. applied for payment out to them of these funds on condition that they took out and lodged in Court policies of assurance payable respectively on the birth of issue to A. F. and M. F. At the date of the application A. F. was married but had no issue, and was fifty-two and a half years old, and M. F. was a spinster aged forty-five. An order was made in accordance with the prayer of the application.

SUMMONS by the two last-named defendants for payment out of Court of funds representing policy moneys on a policy of assurance on the life of Charles Fitzimon.

By settlement, dated 29th June, 1901, of which the plaintiffs were the trustees, Charles Fitzimon settled a policy of assurance on his own life for £2,000 on trust, as to one moiety, for the issue of his daughter Mary Augusta Fitzimon, as she should appoint, and in default of appointment, to such child or children of Mary Augusta as being a son or sons should attain twenty-one years, or being a daughter or daughters should attain the like age or marry. The other moiety was settled upon identical trusts for the issue and children of his daughter Margaret Fitzimon; and the ultimate remainder in both moieties in default of issue was limited to Charles Fitzimon absolutely.

On the 26th May, 1903, Charles Fitzimon mortgaged the policy to Ebenezer John Radford Rowe to secure repayment of the principal sum of £1,800 with interest, and on the 2nd March, 1909, Rowe assigned his interest as mortgagee to Clifford Lloyd. Charles Fitzimon only paid the first premium on the policy, the remaining premiums being paid by Clifford Lloyd. Charles Fitzimon died intestate on the 29th June, 1909; and on the 9th July, 1909, in an action brought to administer the trusts of the settlement of 1901, an order was made giving liberty to the plaintiffs to receive the policy moneys due on the settled policy, and to pay Clifford Lloyd thereout £115 16*s.* 6*d.* for premiums and £93 for interest. These payments were made, and the balance of the policy moneys was lodged in Court to the credit of the matter. At the date of the summons (the subject of this report) the funds in Court representing the policy moneys were £1,401 14*s.* 5*d.* five per cent. War Loan and £63 14*s.* 11*d.* cash.

(1) Before POWELL J.

Clifford Lloyd, having made a will whereby he appointed the defendants Edith M. C. Lloyd and Wilmot H. C. Lloyd his executors, died on the 27th January, 1915, and probate was granted to his executors on the 30th March following. The title of the matter was amended on the 27th February, 1915, by the addition of the above-named executors as defendants.

The whole of the principal sum of £1,800, together with £1,638 for interest, was due to the executors of Clifford Lloyd on foot of the mortgage of 1903.

On the 28th June, 1916, Augusta Fitzimon married a Mr. Fay, but had no issue. At the date of the application she was over fifty-two years of age, having been born on the 24th September, 1869. Margaret Fitzimon did not marry, and, at the date of the application, was just forty-five years old, having been born on the 2nd March, 1877.

The relief sought by the summons was as follows:—"On the said E. M. Clifford Lloyd and Wilmot H. C. Lloyd effecting and lodging in the Court a policy of assurance at a single premium with the Scottish Union and National Insurance Co. in the names of the plaintiffs, or in such other names as the Judge doth direct, for a sum equal to the present value of half of the £1,401 14*s.* 5*d.* five per cent. War Loan Stock and £63 14*s.* 11*d.* cash, now standing in the books of the Accountant-General to the credit of the matter, with compound interest thereon at the rate of five per cent. per annum calculated with half-yearly rests, to be paid on the birth of issue to Mrs. Mary Augusta Fay, formerly Miss Mary Augusta Fitzimon, the Accountant-General do sell the one moiety of the said sum of stock and do pay the proceeds of such sale and the one moiety of the said sum of £63 14*s.* 11*d.* cash to the said Wilmot Lloyd on account of the moneys now due for principal and interest due on foot of the mortgage of the 26th May, 1903." Similar relief in similar terms on conditions of the effecting and lodging of a policy payable on the birth of issue to Miss Margaret Fitzimon was prayed for in respect of the other moiety of the War Loan Stock and cash to credit.

Herbert Wilson K.C. (with him *A. V. Matheson*), for the applicants:—

There is no presumption of law as to the age when the possibility of child-birth becomes extinct, but Courts of equity in distributing trust moneys have generally considered that at the age of fifty-three women are no longer capable of giving birth to children: Taylor on Evidence, 1920 ed., par. 105. The principle stated by Lord Lindley in *In re Hocking* (1) would appear applicable; he says, at p. 570:—"There, in *In re Lowman* (2), the Court deprived no living person of a possible interest; nor, so far as I am aware, has it ever done so. If property is given to A, in the event of B having no children, can A claim that property before the death of B? My answer is no, neither at law nor in equity, unless B's possible child is the only person who can deprive A of the property." Here the only persons entitled to deprive the applicants of the funds are the possible children of

(1) [1898] 2 Ch. 567. (2) [1895] 2 Ch. 348.

Powell J. 1922. POULTER v. LLOYD.

Mrs. Fay and Miss Fitzimon. In *Carr* v. *Carr* (1) an order similar to that now sought was made, where the applicant was entitled to the fund in the event of there being no issue born to a spinster lady aged fifty-one.

S. L. Brown K.C., for the trustees, did not oppose the application.

Cyril Beatty, for Mrs. Fay and Miss Fitzimon, stated that the two ladies consented to the course proposed by the applicants.

An order was accordingly made in the terms of the summons.

POWELL J.:—

Having regard to the security offered by the applicants, I think I should make the order in the terms of the summons. I do not decide that at the age of fifty-one or forty-five the possibility of child-birth is presumed to be extinct. I make the order in the special circumstances of the case, and because I consider that provision is thereby made for any issue who might become entitled under the settlement.

Solicitors for the applicants: *Clifford Lloyd & Son.*
Solicitor for the trustees: *R. W. Doherty.*
Solicitors for Mrs. Fay and Miss Fitzimon: *Brady & Dawson.*

C. N. K.

(1) 106 L. T. 753.

[HOUSE OF LORDS.]

BROWNE, APPELLANT; MAGUIRE, RESPONDENT (1).

H. L.
1922.
Jan. 26.

Easement—Way of necessity—Land-locked tenement—Grants made at different times—No evidence as to date when owner parted with the last portion of land surrounding the alleged dominant tenement.

The plaintiff was the owner of a farm of land which he had purchased under the provisions of the Irish Land Act, 1909, and which immediately adjoined an historic moat, consisting of a circular close, on which timber was growing, and which was completely surrounded by lands in the occupation of persons, some of whom were tenants of the Earl of Erne, and others of whom (including the plaintiff) had purchased their holding from him. In the year 1919 the defendant purchased the fee-simple of the moat from the Earl of Erne, and subsequently proceeded to cut down the timber growing on it, and to remove it by a pass leading to the county road, claiming that he had a right so to use the pass as a way of necessity. In an action for an injunction to restrain the defendant from carting the felled timber over the pass:

The House of Lords (1) *held*, that no evidence having been given to establish beyond reasonable doubt what were the dates on which Lord Erne had parted with the several portions of land surrounding the close, it was impossible to say over which plot of land the implied easement of necessity existed, and dismissed the appeal from the judgment of the Court of Appeal in Ireland ([1921] 1 I. R. 148), which declared that the defendant was not entitled to use the pass in the way claimed.

LORD BUCKMASTER (2):—

My Lords, the question raised upon this appeal is as to the existence and extent of a right claimed by the appellant to pass over the respondent's land for the purpose of cutting and carrying from a piece of property that he has purchased from the Earl of Erne the timber that grows thereon.

The physical facts of the case can be shortly stated. There exists in Cornashee, in the county of Fermanagh, a moat ring or rath of undoubted antiquity and of uncertain origin. It is some 3 acres 2 roods in area, and upon it there are trees, some of which have grown to maturity, some of which have passed into decay. It is surrounded by a marked boundary, and it is on all sides cut off from access to the highway by the surrounding property. Both this moat ring and all the surrounding property were once in the absolute ownership of the Earl of Erne; but at a date a long time past, at any rate as early as 1856, he had granted tenancies of the whole of the adjacent land, but the moat ring itself he never dealt with until it was sold by the trustees of the present earl to the appellant on 11th February, 1919.

The respondent was originally one of the tenants, and since March, 1918, had been the owner of property that lay on the west side of the moat ring, and extended to the highway. Running along the northern

(1) Before LORDS BUCKMASTER, ATKINSON, SUMNER, PARMOOR, and CARSON.
(2) The report of the judgment in the House of Lords has been printed from the shorthand notes of Messrs. W. B. Gurney & Son.

H. L. 1922. BROWNE v. MAGUIRE.

boundary of his holding there is and has for some time past been a metalled road, which had access to the highway at one end and to the moat ring at the other. At the place where this road entered upon the moat ring there was a gate 3 feet 2 inches in breadth, and this was placed in a large stone wall that ran some 20 feet or more along the boundary of the moat. The gate which opened on to the highway was 9 feet wide, and the road, although it led directly from the highway to the moat ring, turned round as it approached the moat ring and led, still as a metalled road, to a house on the respondent's land. The road was bounded on each side by a hedge which turned towards the house.

It is in these circumstances that the defendant, having bought the moat and cut down the trees, proceeded to carry them along the road, claiming that he has the right to use this metalled track for the purposes of bringing his timber on to the highway. The result of his action was that the respondent took proceedings against him for damages for trespass and an injunction to restrain his continued use of the road for the aforesaid purpose.

Mr. Justice Powell dismissed the action with costs, his judgment being reversed by the Court of Appeal, from whose judgment this appeal has been brought.

The appellant claims that his right to use the road arises in this way. He says that as the moat ring is surrounded altogether by property that was at one time in the possession of his grantor, it must be assumed that there was a right-of-way reserved in favour of the earl when he dealt with the property that surrounded the moat, and that that right-of-way has been granted to him. The right-of-way is one which, according to his contention, must not be measured merely by considering the actual previous user of the track, the entrances from the track on to the mound, or the physical circumstances at the spot where the gate into the moat ring is to be found; that is to say, it must not be measured by considering that any extension of it in the manner he desires could only be effected by the destruction of part of the large stone wall. He says that those are only circumstances which must be brought into line with the other circumstances—namely, that the only commercial value of this plot of land is for the purpose of cutting down the timber, and that as that was the accepted purpose as between all parties it necessarily followed that the right-of-way implied by necessity would be a right including the right to remove the timber so cut.

Now, my Lords, what appears to me to be the fallacy, and the profound fallacy, that underlies this argument is this. The right that the defendant obtained in this case was only a right which he got by virtue of his grant from Lord Erne's trustees; there is no other right. At the time of that grant there was no apparent evidence of any established easement except for foot passengers, suggesting an existing easement connecting this piece of land with the highway other than the metalled track and the small gate, which clearly in themselves would afford no evidence whatever of any easement wide enough to enable the owner of the moat ring to use the track for the purpose of carting timber; unless, therefore, it can be shown that Lord Erne's trustees were at the date of the grant in possession of a greater right

than that so evidenced, and that the deed in its turn conveyed that greater right to the defendant, it would necessarily follow that he would fail in his defence.

Now, in order to show that Lord Erne did possess this wider right, it would be essential to establish what was the latest date when Lord Erne parted with the surrounding plots of land, which left the moat ring like an island surrounded by the property in the occupation of other people. No evidence of that kind has been brought before us at all, but without such evidence to establish beyond reasonable doubt what were the dates in which these various dealings with Lord Erne's property took place, it would be quite impossible to say over which plot of land this implied easement of necessity existed; for, so long as any part remained in Lord Erne's own possession, no right over other parts with which he had parted could be implied as an easement of necessity. The defendant therefore fails initially by reason of his inability to show that there ever was reserved to Lord Erne, by virtue of the doctrine that he invokes, a right over the part in question commensurate with that which he desires.

My Lords, that seems to me to be a sufficient answer to the whole case. The truth is that the effect of the grant to the appellant has been to grant to him what, if there be an easement at all, is only such an easement as is established by the road and the use to which it had been put, and only casually had this road ever been used excepting in the manner consistent with the gate in the boundary surrounding the plot, which is only suitable for foot passengers; the defendant is unable in the circumstances as disclosed by the evidence to establish any wider and more liberal privilege.

My Lords, for these reasons, and without embarking upon other considerations which might deserve attention if these did not commend themselves to your Lordships as a sufficient answer to that case, I beg to move your Lordships that the appeal be dismissed.

LORDS ATKINSON, SUMNER, PARMOOR, and CARSON concurred.

Powell J.
1921.
June 3.
July 8.
Oct. 26.
Nov. 9, 10,
16, 18.
1922.
Jan. 12.
March 27.

IN THE MATTER OF THE COMPANIES ACTS AND IN THE MATTER OF THE OLDERFLEET SHIPBUILDING AND ENGINEERING COMPANY, LTD.

Company—Winding up—Companies (Consolidated) Act, 1908, *ss.* 93, 210, 212—*Debentures—Registration—Equitable charge—Cash paid at time of creation of charge—Fraudulent preference.*

The Olderfleet Shipbuilding and Engineering Company was incorporated as a limited company in 1910. The articles of association provided, inter alia, that—1, the management of the business should be vested in the directors; 2, the directors should have authority to effect or abandon any negotiation or arrangement in relation to the business of the company; and 3, the directors should not borrow more than £6,000 without the sanction of a general meeting. Financial difficulties having arisen in November, 1920, at an extraordinary general meeting resolutions were passed appointing a committee to arrange to raise £50,000 on debentures and deposit of the company's title deeds, and authorizing the directors to borrow in excess of the £6,000. On the 9th December, at another extraordinary general meeting, the committee reported that the Ulster Bank had offered to lend £50,000 on the security of debentures for that amount, personal guarantees for £20,000, and a deposit of the company's title deeds. The offer was accepted by resolution of the meeting. At the close of this meeting the directors met, and resolved that the company should open an account with the Ulster Bank, and arrangements were made as to drawing cheques on this account. On the 17th December the secretary of the company sent the title deeds to the bank. On the 14th January, 1921, at a directors' meeting resolutions were passed that sixty debentures of £1,000 each should be issued, and that the secretary be authorized to deposit the company's title deeds. The debentures were issued on the 26th January, 1921. On the 20th January the secretary of the company purported to make a formal deposit of the title deeds which had been retained by the bank since the 17th December, 1920. The debentures were registered on the 1st February, 1921. On the 1st January, 1921, the Bank had advanced over £49,000, and on the 1st February their total advances amounted to over £52,000. These advances had been used, inter alia, for the payment off of the company's previous bankers. A resolution voluntarily winding up the company was passed on the 23rd February, 1921, and an order for the compulsory winding up was made on the 22nd March following. On summons by the liquidator:

Held, 1, that there was no equitable charge in favour of the bank prior to 14th January, 1921, requiring to be registered under sect. 93 of the Companies (Consolidation) Act, 1908, which would invalidate the subsequent legal debentures; 2, that although £49,000 was advanced by the bank before the 1st January, 1921, these advances were cash paid to the company at the time of the creation of the charge within the meaning of sect. 212 of the Act; and 3, that the transactions with the bank did not constitute a fraudulent preference within sect. 210.

This was an application on the part of the liquidator for an order declaring that a deposit of title deeds made by the company on the 17th December, 1920, in pursuance of a resolution of the company and of the directors dated the 9th of December, 1920, is void and of no effect as against the liquidator and creditors of the company in so far as such deposit created a charge on the property of the company, on the ground that the said charge was not registered within twenty-one days of its execution; that, having regard to the resolution of the 9th December, 1920, and the deposit of the title deeds of the company on the 17th December, 1920, together with the advance of

the money by the Ulster Bank in December, 1920, the resolution of the directors of the company of the 14th January, 1921, and the registration of a charge on the 1st day of February, 1921, is in the nature of a fraudulent preference and void; that the agreement with the Ulster Bank and the resolution of the company and of the directors of the 9th December, 1920, to issue debentures for £50,000, charging the company's property both present and future, are void against the liquidator and creditors of the company, as such an agreement and resolution amount to an agreement to charge the property of the company with the amount of such debentures, not having been registered within twenty-one days; that, having regard to the resolution of the 9th December, 1920, and the advance of the money by the Ulster Bank in December, the debentures signed on the 26th January, 1921, and purporting to have been issued in pursuance of a resolution of the 14th January, 1921, were fraudulent, void, and of no effect as against the liquidator and creditors of the company, as being an attempt to give a preference to the Ulster Bank, Ltd.; in the alternative, that the said debentures issued on the 26th January, 1921, and registered on the 1st February, 1921, being a floating charge on the undertaking or property of the company, created within three months of the commencement of the winding up of the company, are invalid and of no effect, except to the amount of £741 16*s.* 11*d.*, being the total amount of cash paid to the company by the Ulster Bank, Ltd., at the time of or subsequent to the creation of said debentures, together with interest on this amount at the rate of 5 per cent. per annum.

The solicitors for the liquidator obtained liberty to add an additional clause to the summons, namely, that the equitable mortgage by way of deposit of title deeds and the issue of fifty debentures of £1,000 each, purporting to be made in pursuance of the resolution of the directors of the 14th January, 1921, were void and of no effect so far as they create any charge or security on the company's property, as the said resolution of the directors was of no effect, being passed at a meeting of the directors at which there was no effective quorum, as two of the directors present were interested in the subject-matter of the resolution, and that the Ulster Bank had full notice of this fact, or ought, from the facts which were brought to their attention, to have had full notice.

The Olderfleet Shipbuilding and Engineering Company was incorporated on the 21st day of March, 1919, and since then ordinary shares, amounting in all to £50,700, had been issued as fully paid up.

The articles of association of the company and the memorandum of association have been put in evidence, and the objects for which the company was established are set out in the clauses of Article 3.

Clause 95 of the memorandum of association provides that the business of the company shall be managed by the directors, who shall be entitled to exercise all the powers and functions whatsoever of the company, save those only which by the statute or by these articles require to be exercised by the company in general meeting, but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

Powell J.
1921.

In re OLDERFLEET SHIP-BUILDING CO.

Sub-clause (P) of clause 96 provides that the directors may enter into and carry into effect or abandon any negotiation or arrangement in relation to the business of the company.

Sub-clause (Q) provides that the directors may at any time after registration of the company, and from time to time, borrow or raise for the purposes of the company from any person, whether a director or shareholder or joint shareholder of the company or not, or corporation, on debenture, bond, or mortgage affecting any part of the property of the company, or other security, or by bank overdraft, bill, or otherwise, any sum of money not exceeding in all the sum of £6,000, without the consent of the company obtained in general meeting, and that on such terms and conditions as they may think proper.

On the 25th October, 1920, the Belfast Banking Co. wrote to the company drawing their attention to the fact that the debit balance on this date was £24,521 19*s.* 5*d.*, and that for the present no further payments would be made by the bank for the company. Apparently the Belfast Banking Co. held no security for the overdraft, but they held guarantees for £16,000, which, on the 7th January, 1921, they returned to the company.

On the 10th November, 1920, there was an extraordinary general meeting of the shareholders of the company held in Belfast. According to the minutes of that meeting, the chairman said that the meeting had been called in order to discuss the financial position of the company and the question of increasing the capital of the company, and he went into the figures. A discussion took place, and ultimately one of the members proposed that the Board authorize the directors to see the bank, i.e., the Belfast Bank, to deposit the deeds of the company, if necessary, and to arrange, if possible, to get an overdraft of £50,000. One of the members stated that if their present bank was not willing to do this other bankers should be approached. It was thereupon resolved that a committee consisting of certain named directors be authorized to call on the bank or banks to see if the above proposal could be carried out. It was also resolved that the directors had permission of the shareholders to have their borrowing powers increased over the £6,000, as allowed by Article 96, par. (Q), of the articles of association of the company. [This is obviously intended to mean par. 96 of the memorandum of association of the company.]

On Thursday, the 9th December, 1920, there was another extraordinary meeting of the shareholders, at which the minutes of the meeting of the 10th November were read and confirmed. The chairman, one of the directors, who had been authorized at the previous meeting to approach the bank or bankers, reported that he and the other persons appointed had on that day visited the Ulster Bank, and that after considering the matter, the directors of that bank were prepared to advance £50,000 on debentures equal to that amount, a deposit of the deeds of the company, and personal guarantees of £20,000. The meeting resolved to accept this offer, which would allow them to finish the ships contracted for, and after that to dispose of the concern if need be. The following persons agreed to give personal guarantees to the bank:—Mr. Harbinson, £5,000; Mr. F. D. Brown, £5,000; Mr. W. H. Kane, £5,000; Mr. Wm. Rainey, £4,000;

Mr. Wm. Telford, £1,000; making in all £20,000, as requested by the bank. The following resolution was carried unanimously:—"The directors are hereby authorized in issuing 500 debentures of £100 each to the Ulster Bank, Ltd., charging the company's property, present and future, and by depositing deeds of land at Foundry and Curran Point"; and it was also resolved by the directors at the conclusion of the general meeting that the company should change their bankers from the Belfast Banking Co. to the Ulster Bank, and arrangements were made as to drawing cheques on the new account.

A meeting of the directors was held immediately following this extraordinary meeting of shareholders, and at this meeting it was unanimously resolved: "That the Ulster Bank, Ltd., be appointed the bankers of the company, with the usual provision as to signature of documents by any two directors." On the 14th January, 1921, at a meeting of the directors, a resolution was passed:—"That an issue of sixty debentures of £1,000 each, equal to £60,000, be made in favour of the Ulster Bank, Ltd., charging the company's property, present and future, and the company by depositing the deeds of land held at Foundry and Curran Point." It was proposed and carried:—"That Mr. W. H. Kane and Mr. Wm. Rainey, directors, together with the secretary, Mr. Buchanan, be appointed to sign the debentures on behalf of the company." It was also proposed, seconded, and carried unanimously:—"That the secretary, Mr. Buchanan, be appointed to deposit the title deeds of the company with the Ulster Bank, Ltd., as a security on behalf of the company."

On the 26th January, 1921, sixty debentures of £1,000 each were issued to the bank. On the 1st February, 1921, these debentures were duly registered. On the 11th February, 1921, the Secretary of the bank wrote to the directors, making formal demand for payment of £50,000 for principal on foot of these debentures, and on the 12th February, 1921, the bank appointed a receiver over the property charged by the debentures. At an extraordinary meeting of the shareholders, held on the 23rd February, 1921, a resolution was passed for the voluntary winding up of the company. On the 7th February, 1921, a petition for the winding up of the company was filed. On the 22nd March, 1921, the Court made an order for the compulsory winding up of the company. The Ulster Bank suggested, and the suggestion was adopted, that Mr. M'Ninch, solicitor for the company, should prepare the debentures.

It appears from the affidavit of the liquidator that up to the 31st December, 1920, the Ulster Bank had advanced to the company various sums, leaving a net balance due of £49,641 7*s.* 5*d.* Out of this sum the company paid off the overdraft to the Belfast Bank amounting to £24,708 18*s.* 10*d.* The total amount advanced to the 1st February, 1921, appears to be the sum of £52,970 17*s.* 7*d.*, not including interest. There appears to have been an additional sum of £318 18*s.* 11*d.* due to the bank on a No. 2 account. According to the account furnished by the bank there was due to them for principal and interest up to the 11th February, 1921, the sum of £54,859 5*s.* 5*d.* The moneys so advanced were devoted by the company, in the first instance, to paying off the debt due to the Belfast Bank, and subsequently, to a large extent, in paying other debts of the company.

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1921.

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Dickie K.C., *Overend K.C.*, and *James Henry*, for the liquidator:—

The resolution of the company, dated the 9th December, 1920, accompanied by the fact of the notice to the bank of the resolution, and the advance by the bank constitute an agreement for a charge which should have been registered as from 10th December. It was not registered within twenty-one days, as required by sect. 93 of the Companies Consolidation Act, 1908. The sending of the deeds on the 17th December to the bank was a deposit of those deeds, and therefore an equitable charge, and in order to be effective must be registered within twenty-one days: *Huth* v. *Clarke* (1); *Marshall's Valve Gear, Ltd.*, v. *Manning, Wardle, & Co.* (2); *Pegge* v. *Neath Trams* (3); *Essberger & Son, Ltd.*, v. *Capital and Counties Bank* (4). The debentures issued in pursuance of the resolution of the 14th January, 1921, were a fraudulent preference, because the total money had been advanced prior to the 14th January: *Jackson* v. *Bassford* (5); *Orleans Motor Co., Ltd.*, (6). The borrowing by the directors was in excess of their powers and invalid. The resolution of the company, passed at a general meeting, was not a special resolution within the meaning of sect. 13 of the Act of 1908, and could not alter the clause in the memorandum: *Grant* v. *United Kingdom Switchback Co.* (7). The resolution of the 14th January, 1921, is invalid, as two of the directors were disqualified from voting by being interested as guarantors in the subject-matter of the resolution: *In re Greymouth Point Elizabeth Railway and Coal Co., Ltd.* (8).

S. L. Brown K.C., *H. Wilson K.C.*, *J. M. Whitaker K.C.*, and *W. Beattie K.C.*, for the Ulster Bank, Limited:—

Until the date of the resolution of the directors on the 14th January, 1921, no valid charge was created. Even assuming that a valid charge was created by the resolution of the 9th December, 1921, the registration of the debentures was effected within twenty-one days of their issue, and such registration is sufficient: *In re Defries & Co., Ltd.* (9). The issue of the debentures was not a fraudulent preference. The payments made by the bank were made "at the time" the charge was created, namely, the 14th January: Companies Consolidation Act, 1908, sects. 93, 212; *Columbian Fireproofing Co., Ltd.* (10); *Garrard* v. *Hunting and Others* (11); *Sharp* v. *Jackson* (12); *Ex parte Taylor* (13).

Cur. adv. vult.

(1) L.R. 25 Q. B. D. 391.
(2) [1909] 1 Ch. 267.
(3) [1898] 1 Ch. 183.
(4) [1913] 2 Ch. 366.
(5) [1906] 2 Ch. 467.
(6) [1911] 2 Ch. 41.
(7) 40 Ch. D. 135.
(8) [1904] 1 Ch. 32.
(9) [1904] 1 Ch. 37.
(10) [1910] 1 Ch. 758.
(11) [1897] 2 Q. B. 19.
(12) [1899] A. C. 419.
(13) 18 Q. B. D. 295.

Powell J.
1922.

In re OLDERFLEET SHIP-BUILDING CO.

March 27.

POWELL J., having stated the facts, continued :—

I will first deal with the question raised by paragraph 3 of the first summons [His Lordship read the summons], viz., that the agreement with the Ulster Bank and the resolution of the company and of the directors of the 9th December, 1920, to issue debentures for £50,000, charging the company's property, is void as against the liquidator and creditors of the company, as such agreement and resolution amount to an agreement to charge the property of the company with the amount of such debentures, not having been registered within twenty-one days in accordance with sect. 93 of the Act of 1908. Counsel for the bank say, in the first place, that no valid charge was created until the resolution of the directors was passed on the 14th January, 1921; that the company having made arrangements for the loan, authorized the directors to carry them out, which was, they say, legally their business, under clause 95 of the memorandum, by issuing the debentures and thereby creating the charge which they did by passing the resolution of the 14th January, 1921. Counsel for the liquidator, on the other hand, contend that the effect of the resolution of the 9th December, when taken in conjunction with the immediate advances made by the bank, was that an equitable charge was then created within the meaning of the section. I do not think that this is so. The resolution of the 9th December, 1920, does not purport to give any charge, but is simply an authorization to the persons upon whom, under the provisions in the Memorandum referred to, the duty devolved of carrying out the transaction.

But counsel for the liquidator further contend that the resolution of the 9th of December, 1920, was merely a delegation to the directors, and did not take away the power of the company to borrow money and to give a charge under Article 14 of the articles of association; that it was merely a delegation from principals to their agent, and they rely on *Huth* v. *Clarke* (1), in which case it was held that an executive committee of a county council had power to issue certain regulations under the Rabies Order of 1887 without expressly revoking a delegation to a local sub-committee to whom it had delegated its powers under the Contagious Diseases Act, on the ground that the delegation was not equivalent to a surrender by the executive committee of its own power, and that the delegation was subject to resumption at any time. In that case the executive committee actually made an order under the Act, and the sub-committee had not made, although they had power to make, regulations to the same effect. The case turned upon the meaning of the word "delegated," and, as pointed out by Wills J., delegation, as the word is generally used, does not imply parting with power by the person who grants the delegation. When one sees what was actually done here by the company and by the directors, and when one examines the authorities bearing on the point as affecting the company, I think it will be seen that the decision in the case referred to does not affect the question to be determined on this point in the present case. Whether or not the company, on the 9th December, 1920, notwithstanding clause 95 and its sub-clauses, could have passed a resolution authorizing the issue of debentures there and then—and I do not think that they could—

(1) L. R. 25 Q. B. D. 391.

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they did not do so by the resolution of that date; they authorized the directors to do so, and the only resolution of the directors actually authorizing the issue is the resolution of the 14th January, 1921.

Marshall's Valve Gear, Ltd., v. *Manning, Ward, & Co.* (1), relied upon on this point, does not, I think, help. There the power of the directors was governed by an article in the schedule to the Companies Act of 1862, which provided that their powers were to be subject to such regulation as might be prescribed by the company in general meeting. It was assumed and admitted that the managing director, who had commenced the action which the other directors sought to stay, would have the majority of votes at a general meeting; and as Mr. Justice Neville pointed out, there was no object to be gained in calling a meeting, because the result of that meeting was a foregone conclusion. What the learned Judge in that case decided was that on the construction of Article 55, Sch. 1, to the Companies Act, 1862, in the absence of any contract to the contrary, the majority of the shareholders of a company have the ultimate control of its affairs, but the learned Judge expressly guards himself from expressing any disapproval of the decision in the *Automatic Self-Cleansing Filtering Syndicate Co.* v. *Cunningham* 2), although he does not seem to have approved of some of the dicta in the judgments. That case is strongly relied upon on this point by counsel for the bank. The clause in the articles in that case—96—is in substance the same as clause 95 in the memorandum of association in the present case. But there is in addition in the memorandum here sub-clause (P), which gives the directors power either to carry into effect or to abandon any negotiation or arrangement in relation to the business of the company. At a general meeting of the company a resolution was passed by a simple majority of the shareholders for the sale of the company's assets, which directed the directors to carry it into effect. The directors refused to do so. It was held by Warrington J. in the Court below, and by the Court of Appeal, that the directors could not be compelled to comply with the resolution. Cozens-Hardy L.J. expressly negatives the contention that the relation between the company and the directors is that of simply principal and agent. He says, "I do not think it is true to say that the directors are agents; I think it is much more nearly true to say that they are in the position of managing partners, appointed to fill the post by mutual arrangement between the shareholders."

In *Gramophone and Typewriter, Ltd.*, v. *Stanley* (3) Lord Justice Buckley says (at p. 105): "This Court decided not long since in *Automatic, etc., Co., Ltd.*, v. *Cunningham* (2) that even a resolution of a numerical majority at a general meeting of a company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by shareholders as individuals. They are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may, by the regulations, be entrusted with the control of the business, and, if so entrusted, they can be dispossessed from that control only by the statutory majority which can alter the articles." In *Salmon* v. *Quinn* (4), which was decided after the case

(1) [1909] 1 Ch. 267.
(2) [1906] 2 Ch. 34.
(3) [1908] 2 K. B. 89.
(4) [1909] 1 Ch. 311.

of *Marshall's Valve Gear Co.* (1), Lord Justice Farwell approves of the decision and reasoning of the Lords Justices in *Automatic, etc., Co. Case* (2) and the *Gramaphone Case* (3), and in particular the passage from the judgment of Buckley L.J. in the former case, to which I have just referred. The decision in the case was approved by the House of Lords.

It is clear in the present case, I think, that the directors passed the resolution of the 14th January, 1921, not as agents for the company, but by virtue of the powers vested in them by clause 95 of the memorandum, and that then and not at any earlier stage the charge was created. Counsel for the liquidator say that the resolution of the 9th December is evidence of a definite contract immediately performed; that the contract was in part performed by the bank, who made advances in part performance; that there was then, therefore, a good, valid, and equitable charge in favour of the bank; and that this charge should have been registered under the section. I do not think that this is so. Negotiations had been going on between the persons nominated at the meeting of the 10th November, 1920, who, no doubt, were directors, but who did not pass any resolution to issue the debentures until the 14th January, 1921; and the Ulster Bank, the persons so nominated, having been authorized to see the bank, that is, their then bankers, the Belfast Bank, to deposit the deeds of the company if necessary, and arrange, if possible, to get an overdraft of £50,000, to which was added that if their present bankers were not willing, other bankers would be approached. Then at their meeting of the 9th of December, 1920, the company learned from the persons nominated as above that the Ulster Bank were prepared to advance £50,000 on debentures, the security of a deposit of the deeds of the company, and personal guarantees for £20,000; and the meeting resolved to accept this offer, which would enable them to finish the ships contracted for, and after this to dispose of the concern if need be. But apparently they recognized that although they might accept the offer, they could not carry out the transaction; they could not usurp the functions of the directors, and consequently they did not pass any resolution authorizing the issue of the debentures charging the company's property, but they authorized the directors to carry out the transaction, and by a subsequent resolution they gave the directors permission to change their bankers from the Belfast Banking Company to the Ulster Bank.

I do not think it can be said that this resolution authorizing the directors to issue the debentures constituted a valid equitable charge within the meaning of sect 93, sub-s. 1. It is said that the resolution establishes the existence of an agreement to create a security in consideration of an advance made. I think it is only evidence of an authority to persons who legally could create a security, in consideration of an advance made, to create it.

The decision in *Pegge* v. *Neath* (4) was strongly relied upon by counsel for the liquidator. It has not, I think, met this point. The several undertakings and agreements relied on by the plaintiff, and in respect of which he claimed to have debentures of the second series

(1) [1909] 1 Ch. 267.
(2) [1906] 2 Ch. 34.
(3) [1908] 2 K. B. 89.
(4) [1898] 1 Ch. 183.

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issued to him, were given and made by the directors and not by the company; and Mr. Justice North, in the circumstances of that case, held that the plaintiff was entitled to them. In so deciding he was following a decision of his own in *Queensland Land and Coal Co., Davis* v. *Martin* (1), in which he held that the plaintiffs had a good and equitable claim on certain debentures, although the debentures in question were void as legal instruments. But the equitable claim in that case was founded on resolutions of the directors. Mr. Justice North said: "Assuming that there is a clear definite contract to have the debentures issued to the plaintiff in respect of the loan, it seems to me that they have as good a claim as any debentures could give them, except that their claim is equitable and not legal." I do not think that there was any clear definite contract here to give the debentures until the directors passed the resolution on the 14th January, 1921.

It is said that the circumstance that immediately on the passing of the resolution of the 9th of December, 1920, and between that date and the 14th of January, 1921, large sums of money were advanced by the Ulster Bank, shows that the bank regarded the resolution of the 9th of December as an agreement or contract to give them these debentures in consideration of the advance, and that they could have insisted on being secured in respect of any moneys advanced after the 9th December.

I do not think that the advance of the money by the bank is sufficient to constitute a contract to give security in the face of the terms of the resolution of the 9th December, which did not, as I think, purport to create the security. But, moreover, the correspondence clearly shows that the Ulster Bank perfectly well understood that it would be necessary to have a resolution of the directors authorizing the issue of the debentures. It is clear from this correspondence that the officials of the bank were well aware that it would be necessary for the directors to pass a resolution authorizing the issue, and they appear to have been willing to make the advance, and did make it, believing that the directors would carry out the terms of that resolution.

On the 10th December, 1920, the secretary of the company wrote to the manager of the Ulster Bank at Larne, sending him a copy of the resolution of the 9th December, and a copy of the resolution of the directors of the same date authorizing the change of bankers from the Belfast Bank to them; and on the same date, at the request of the directors of the Ulster Bank, he sent the manager at Larne a copy of the memorandum of association, and the names of the directors and secretary of the company. On the 24th December, 1920, the solicitor of the bank wrote to Mr. M'Ninch, the solicitor for the company, who, with the consent of the bank, was the solicitor who was to prepare the debentures in which he says (inter alia) that in addition to the resolution by the company there should also be a resolution by the directors authorizing the execution of the debentures, and appointing some of their number to deposit the title deeds with the bank as security on behalf of the company. This, I think, shows that the bank were aware that the matter was incomplete and ineffective until the directors had authorized the execution of the debentures. On the

(1) [1894] 3 Ch. 181.

14th January, 1921, the secretary of the bank sent to the manager at Larne a copy of the resolutions passed on that day by the directors: 1, resolving that an issue of £50,000 debentures be made in favour of the bank, and that the deeds of land at Foundry and Curran Point be deposited; 2, that two of the directors and the secretary were appointed to sign the debentures; 3, that the secretary was appointed to deposit the title deeds of the company with the bank as security.

I think that when these resolutions were passed by the directors, and not till then, there was what Mr. Justice North called a clear definite contract to have debentures issued to the bank in respect of the loan, giving them as good a claim as the debentures could give them, that is, an equitable claim. No doubt the bank had then advanced a large sum of money, apparently knowing the character of the persons with whom they were dealing; they were satisfied that the arrangement would be legally carried out by the directors; but I think it is plain, as I say, that they were aware that it would be necessary for the directors legally to carry it out.

It was suggested by Mr. Overend that the resolution passed by the directors on the 9th December, 1920, appointing the Ulster Bank the bankers of the company, and the consequent arrangement as to cheques and so forth is evidence of the creation at that date of a charge. I do not think it can have such effect. It was merely a step taken by the directors towards the carrying out by the directors of a transaction which was not in fact carried out until the 14th January. But Mr. Overend says that, assuming that the transaction was carried out by the directors under Article 96, clause (Q), that as the borrowing exceeded the limits of £5,000, that clause was inoperative; that it would require an alteration of the memorandum to give them the requisite borrowing power to carry out the transaction, and that this could only be done by a special resolution of the company; that the resolution of the company passed at a general meeting of the 10th November, 1920, was not a special resolution within the meaning of sect. 13 of the Act of 1908, and did not and could not alter the clause in the memorandum; that it could not give the directors power to do acts in future which they were not authorized by the clause in question to do, and that therefore the borrowing itself was ultra vires and invalid. This contention, as it appears to me, that the borrowing here from the bank by the directors is entirely invalid is not raised by the present summons. It was put forward in reply, and I have not heard counsel for the bank upon it; but I think I should nevertheless deal with it, and of course counsel for the bank can put forward any argument they wish on the point in the Court above.

Mr. Overend relies on the statement of Lord Justice Cotton in his judgment in *Grant* v. *United Kingdom Switchback Railway Co.* (1). The article in question in that case, Article 100, contained an actual prohibition against a director voting in respect of any contract or arrangement in which he was interested. Directors who were interested entered into a certain agreement for sale of part of the property of the company. At an extraordinary meeting of the shareholders the agreement so entered into was ratified, but not in such a way as to make it a special resolution. This adoption of the contract was held

(1) 40 Ch. D. 135.

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not to be an alteration of the articles, and that it could be effected by ordinary resolution. But Cotton L.J. in his judgment says this: "To give the directors power to do things in future which the articles did not authorize them to do would be an alteration of the articles, but it is no alteration of the articles to ratify a contract which has been made without authority."

Article 96, clause 2, in this case enables the directors to borrow and give security without the consent of the company in general meeting up to the limit of £5,000. I take it that the meaning of this is that they may borrow and give security in respect of any sum to which the company consents in general meeting, and that without any alteration of the clause in question.

The whole resolution of the 10th December, 1920, must be looked at. There was a proposal before the meeting to borrow £50,000 on an overdraft. It was resolved that a committee should call on the bank or banks to see if "the above proposal" could be carried out; and then came the permission or consent of the shareholders to have the borrowing powers of the directors increased over the £5,000 to enable that particular transaction to be carried out if it could be arranged. Construing the whole resolution in a reasonable way, I think that this was not giving the directors power to "do things in future which the articles did not authorize," but that there was a special power given to the directors to carry out a certain definite transaction, namely, the borrowing of the £50,000 mentioned and the giving of security for same, and to enable them to do this the latter part of the resolution provided for the removal of the limit. The directors could not in the future exceed the limit of £5,000 except in respect of the overdraft of £50,000 if it could be arranged. As Lord Justice Bowen said in his judgment in *Grant's Case* (1), "There is nothing in them [i.e. the articles] to prevent the company from giving special power to the directors in a particular case as to a particular contract." I think, therefore, that this contention fails.

Before leaving matters arising under sect. 93 it is right to refer to a contention put forward by Mr. Brown on behalf of the company, namely, that even assuming there was a valid charge created by the resolution of the 9th December, 1920, notwithstanding there was no registration of this charge within twenty-one days, nevertheless, as the debentures were registered under sub-s. 3 of sect. 93 within twenty-one days of their issue, such registration is sufficient. Certainly the judgment of Mr. Justice Buckley in *In re Defries & Co., Ltd.* (2), would appear to indicate that if the bank chose to rely on the debentures themselves so registered as their securities, and not upon an agreement to give them, creating a charge in equity, they could do so, and that the only result of the non-registration of the equitable charge would be that there was no security until the debentures were issued, with a consequent loss of priority, so that debts contracted by the company during the interval would stand first. And Mr. Justice Sargeant, in his judgment in *Essberger & Son, Ltd.*, v. *Capital and Counties Bank*, (3) a case to which I shall have to refer on another point later on, seems to be inclined to adopt the view of Mr. Justice Buckley in that case, and the same view of the same

(1) 40 Ch. D. 135. (2) [1904] 1 Ch. 37. (3) [1913] 2 Ch. 366.

learned Judge in *In re Cardiff Workmen's Cottage Co.* (1); but he did not decide this particular point. Nor is it necessary for me to decide the point in this case, having regard to the view which I take that there was no charge created prior to the 14th January, 1921.

Then it is said that these debentures, signed on the 26th January, 1921, and purporting to have been issued in pursuance of the resolution of the 14th January, 1921, were fraudulent and void, and of no effect, as being a fraudulent preference under sect. 210. Reliance was placed by counsel for the liquidator in support of this contention upon the case of *Jackson* v. *Bassford, Ltd.* (2). When the facts and circumstances of that case are examined, it will be found that the reason why giving the debentures to Wm. Jackson, one of the directors, was held to be a fraudulent preference was because the issue of debentures was purposely delayed with the connivance of Wm. Jackson, so that the company could go on incurring debts until the eve of its insolvency. He pointed out that the board of the company was so constituted as to leave no room for doubt that Wm. Jackson could have had his debenture at any moment he choose to ask for it. He, his friend Bashford, and his son were the three directors. Directly he asked for the debenture he got it, and he could have had it earlier if he had expressed a wish for it. He says—the facts point to this—that relying upon the possession of an agreement undisclosed, and of course not registered under sect. 14 of the Act of 1900, he went on incurring debts on the part of the company, relying on the fact that he could at any subsequent time when it suited him, on the eve of insolvency, come in and say to the company, "Now I call upon you to give effect to your antecedent promise, and to give me security for the debt which you owe to me long ago." To allow that would be, in substance, to repeal sect. 14 of the Act of 1900. In other words, the learned Judge came to the conclusion that the issue of the debenture was purposely postponed until the company was hopelessly insolvent, and for the purpose of concealing the real state of affairs. That does not seem to me to be an authority in the circumstances of the present case. I do not think there is any ground whatever for coming to the conclusion that the issue of the debentures was purposely delayed in this case. The whole course of business and the correspondence appear to me to negative any such inference.

There are many decisions on this question of fraudulent preference, and whether one considers the judgments of the Court of Appeal in *Ex parte Taylor* (3), or the judgments of the Court of Appeal in the case of the trustee of the property of *New, Prance, & Garrard* v. *Hunting & Others* (4), or the speeches of the Law Lords in the appeal in that case under the name of *Sharp* v. *Jackson* (5), one finds that the test applied in all these cases is what was the dominant motive of the persons alleged to have given the preference. Was it or was it not with a view to prefer? As Lord Esher, in the Court of Appeal, says:—"The doctrine with regard to fraudulent preference is well known. The question whether there has been a fraudulent preference depends, not upon the mere fact that there has been a preference, but

(1) [1906] 2 Ch. 627.
(2) [1906] 2 Ch. 467.
(3) 18 Q. B. D. 295.
(4) [1897] 2 Q. B. 19.
(5) [1899] A. C. 419.

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also on the state of mind of the person who made it. It must be shown, not only that he has preferred a creditor, but that he has fraudulently done so. It depends upon what was in his mind—whether it is called intention, or view, or object does not appear to me to matter much—the question is whether in fact he had the intention to prefer certain creditors. It has been argued that the debtor must be taken to have intended the natural consequences of his act. I do not think that is true for this purpose. I think one must find out what he really did intend." A. L. Smith L.J. said:—"I have always understood that to ascertain whether there has been a fraudulent preference it is necessary to consider what the dominant or real motive of the person making the preference was; whether it is to defraud some creditors by preferring others, or for some other motive." In the House of Lords Lord Halsbury quotes with approval part of the judgment of Lord Esher to which I have referred, and adopts it. He says (at p. 423) that "nothing could have been easier for the Legislature than to have enacted, if they thought proper to do so, that any preference to one creditor over another creditor, or any greater advantage given by previous payment to one creditor to which advantage all the other creditors were not a party, should have itself been a preference which would have been void under the statute; but, he says, in his opinion no such intention is to be inferred from the statute." I am satisfied that the motive of the directors in giving the debentures in this case was not to prefer the Ulster Bank, but to carry out the negotiation between the company and the bank, and which they could have carried out independently of the company once the limit of £5,000 was removed. The body of directors, under clause 96 (P) of the memorandum, might have taken a view independent of the company, and refused to act upon the authority given to them; but I have no doubt that they would have considered that a very dishonourable act, seeing that the bank had come to the relief of the company at a time of difficulty and stress in the affairs of the company; and I cannot see any evidence of any intention on the part of the directors except to carry out and complete the negotiation or arrangement that had been made. I think that the borrowing of this money was an honest and bona fide, but unfortunately unsuccessful, effort by the company and the directors at a very critical and trying time in the industrial world to put this company on its legs, and that it was made in what was believed to be the best interests of the company.

Then it is said that these debentures are void under sect. 212 as being a floating charge on the undertaking or property of the company. Sect. 212 is as follows:—"Where a company is being wound up, a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except the amount of any cash paid to the company at the time of or subsequently to the creation of and in consideration for the charge, together with interest on that amount at the rate of 5 per cent. per annum."

Counsel for the Ulster Bank contend that the payments made by the Ulster Bank were made "at the time" that the charge was

created, namely, on the 14th of January, and they rely upon the authority of the case of *Columbian Fireproofing Co., Ltd.* (1), and on the decision of the Court of Appeal in the same case (2). There it was held that the question whether any particular payment comes within the terms of the section as being in substance a present advance must always be a question of fact, depending upon the circumstances of the case. As a general rule, a payment made on account of the consideration for the change and in anticipation of its execution, and in reliance on a promise to execute it, although made some days before its execution, is made at the time of its creation, within the meaning of the section. On November 25th a full meeting of the Board passed a resolution that the offer of a Mr. Sankey to make an advance of £1,000 be accepted, and that the seal be affixed at the next meeting to such debenture as Mr. Sankey's solicitor should prepare to carry out the arrangement, and that Mr. Sankey be requested to advance to-day the sum of £350 on the strength of this resolution. Mr. Sankey gave his cheque for £350 on that day on account of the proposed loan of £1,000; and on December 2nd, at the urgent request of the secretary, he advanced a further sum of £350 on account of the loan. Mr. Sankey was himself a director. On December 6th the seal of the company was, pursuant to the resolution, affixed in the usual way to a debenture for £3,000 that his solicitor had prepared to carry into effect the resolution of November 25th. The debenture was then handed to Mr. Sankey, who gave his cheque for £300, being the balance of the £1,000. The debenture was dated 6th December, and operated as a floating charge, and was registered on December 23rd. In the beginning of January, 1910, writs were issued against the company by some of its creditors. On the 5th January Mr. Sankey issued a writ to enforce his debenture. On the 28th January the company in general meeting passed an extraordinary resolution for a voluntary winding up, and a liquidator was appointed. The liquidator disputed the validity of the debenture, and Mr. Sankey, while conceding that it was not a security for £2,000. insisted that it was a valid charge for the £1,000. On March 3rd the liquidator took out a summons, claiming, 1, a declaration that the debenture of December 6th was an undue and fraudulent preference of Mr. Sankey over other creditors of the company, but this claim was subsequently abandoned; and, 2, in the alternative, that the debenture might be declared invalid except to the amount of £300 cash paid to the company at the time of or subsequently to the creation thereof. There was evidence that the company was insolvent in November, 1909. The counsel for the liquidator in that case referred to sect. 93 of the Act requiring a charge on the property of a company to be registered within twenty-one days after the date of its creation, and contended that the date of the creation of the security was December 6th, when the debenture was sealed and issued. Apparently it was not considered in that case by the advisers of the liquidator that the creation of the charge was the time of the passing of the resolution of the 25th November, which apparently was not registered. Counsel did argue that if the resolution of November 25th operated as an equitable charge, then the two

(1) [1910] 1 Ch. 758. (2) [1910] 2 Ch. 120.

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sums of £350 were advanced on an equitable charge which had not been registered within twenty-one days of its date, and was therefore void, but that if that resolution was only a promise to give a charge, the two sums of £350 were not advanced at the time of, but before the creation of the security, that is, the issuing of the debenture. He pointed out that the note to the form of certificate in Buckley on Companies with respect to the particulars of the charge to be delivered to the Registrar pursuant to sect. 93 of the Act supported the view that the date of the execution of the debenture was the date of its creation. Neville J. says (at page 765), referring to the facts and dates: "The question is, what is the meaning in this section of the words 'at the time of' the creation of the charge? I think, whether any particular payment comes within these words, it must always be a question of fact depending on the circumstances of a particular case. The word 'time' in this connexion must always be, to some extent, indefinite, for the creation of the security and the payment of the money cannot be simultaneous; and I think that a payment made on account of the consideration for the security in anticipation of its creation and in reliance on a promise to execute it, although made some days before its execution, is made at the time of its creation within the meaning of the section. Here, I think, the two payments of £350 were made in reliance solely upon the promise to execute the debenture at the next meeting, and on account of the £1,000 which was to be advanced upon it, the payments being made in anticipation of the execution of the debenture to meet the exigencies of the company. I think, therefore, that the whole £1,000 was advanced at the time of the creation of the security. Time in this connexion is not, I think, a matter to be decided by the clock, but in accordance with the substance of the transaction and upon the determination of the question of whether the advance was or was not a present advance." In confirmation of this view he refers to the judgment of Mellish L.J. in *Ex parte Fisher* (1) (at p. 644), where he says: "We do not dispute the rule that where a sum of money is advanced on the faith of a promise that a bill of sale shall be given, such sum is to be treated as a present advance on the security of a bill of sale."

In the Court above, in affirming the decision of Mr. Justice Neville, the Master of the Rolls said that it was conceded by counsel for the appellant that the word "at" does not mean contemporaneously with or immediately in exchange for the security, or at the same moment as the security itself is created. It is a question of fact, in all the circumstances of the case, was this sum paid—as in the present case it has been proved to have been paid a few days before the actual preparation of the debenture, which was being prepared in due course by the solicitor—cash paid to the company within the language of sect. 212 at the time of the creation of the security? "In my opinion," he says, "it clearly was."

Farwell L.J., in agreeing, said: "In my opinion it would be disastrous if we were to construe the words of a provision like this in order to invalidate an honest bona fide transaction carried out in accordance with the usual course of business. It is plain to my

(1) L. R. 7 Ch. 636.

mind that any cash paid to the company at the time cannot mean on the stroke of the clock, or even within the same twenty-four hours. As Mr. Justice Neville has justly remarked, it is not a question of the clock; it is a question of what are the circumstances of each particular case, and what is the real substance of the transaction. When we have once arrived at the fact that this money was 'paid at the time' within the meaning of sect. 212, sect. 93 has no application."

It appears to me in the present case that the money paid by the Ulster Bank was paid in reliance on the arrangement made with the company, and in the belief that the directors would carry out the proposed transaction and give the securities. It was, in my opinion, a bona fide honest transaction; bona fide and honest admittedly on the part of the company, and undoubtedly bona fide and honest on the part of the bank; and I think it was a bona fide honest transaction carried out in accordance with the usual course of business, and the question being, according to Mr. Justice Farwell, a question of what are the circumstances of each particular case and what is the real substance of the transaction; and my view of the real substance of the transaction is as I have stated. There was a necessary delay in carrying out the arrangement, but I cannot say that it was not carried out within a reasonable time.

But counsel for the liquidator rely strongly on the decision of Mr. Justice Parker in *Orleans Motor Co., Ltd.* (1). If the decision of Mr. Justice Parker were in conflict with the decision of the Court of Appeal in the *Columbian Fireproofing Case* (2), I would be obliged to follow the decision of the Court of Appeal in the latter case, notwithstanding the very distinguished position which Mr. Justice Parker at the time of this decision and subsequently held. But it is right to say that Mr. Justice Parker in his judgment did not throw any doubt upon the decision in the *Columbian Fireproofing Case* (2). In the *Orleans Motor Co. Case* (1), on October 13th, 1904, five of the directors of the company gave to their bankers a joint and several guarantee of the overdraft to the extent of £2,000. At the beginning of February, 1910, the overdraft amounted to a large sum, and the bank were pressing the company to pay the overdraft, and also the five directors in respect of their guarantee. A meeting of directors of the company was held on February 8th, 1910, at which all the guaranteeing directors were present, and a resolution was then passed that the company should pay £1,500 to the bank in respect of the overdraft. At the same time it was agreed, although the agreement was not entered on the minutes of the meeting, that in consideration of the guaranteeing directors finding the £1,500, they should receive debentures to cover them, in addition to debentures of the company which they already held. Three of the guaranteeing directors within a few days after the meeting sent to the company three cheques for £500 each, and on February 22nd, 1910. the company sent its cheque to the bank for £1,500. At another meeting of the directors of the company, held on March 8th, 1910, the three directors who had paid the £1,500 were present, and a resolution was passed for the issue of debentures of the company for £500 to each of them. These debentures were never entered, and there was no entry

(1) [1911] 2 Ch. 41. (2) [1910] 1 Ch. 758.

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in respect of them in the register kept under sect. 93 of the Act of 1908. Shortly afterwards an action was brought to realize the debentures of the company, and on April 23rd, 1910, a resolution for the voluntary winding up of the company was passed. The same three directors afterwards sued one of their co-sureties in the King's Bench Division to recover his share of the £1,500 paid by them, and recovered judgment against him. The Master made his certificate in the debenture action, in which he found that in the circumstances the three directors were entitled, in addition to the debentures registered in their names, to stand in the same position as if debentures for £1,500 had been issued to them in accordance with the resolution of March 8th, 1910, and a summons was taken out by a person having the conduct of the proceedings in the debenture action to vary the certificate by striking out this finding. Counsel for the applicant stated that the Master apparently relied on the case of *In re Columbian Fireproofing Co.* (1), but he contended that that case was distinguishable from the case under review; the only payment was to discharge the guarantee in which the directors making the payment had previously joined, that is, the transaction of 1904; that this was not a payment of cash to the company, for that the only concern of the company in the matter was that the directors had a claim over against the company. He also raised the point that the equitable charge, if there was one, was invalid for want of registration under sect. 93 of the Act of 1908, that is, I take it, on the assumption that the resolution of the 8th March, 1910, constituted an equitable charge. As to this point, counsel for the directors contended that where there is a series of debentures constituting a charge, it is sufficient if certain particulars are registered together with one of the debentures, and it is unnecessary to register each debenture, and he relied upon the judgment of Mr. Justice Buckley in *In re Harrogate Estates* (2) to which I have referred. He said that what was done here was a payment of cash in consideration of a charge within the meaning of sect. 212 of the Act, and that it was immaterial whether the payment was made under the guarantee already given, and he referred to the *Columbian Fireproofing Case* (1). Counsel for the appellant again distinguished the *Columbian Fireproofing Case* (1), on the ground that there was no antecedent debt, but the debenture was part of one transaction by which it was given in consideration of a cash payment. Mr. Justice Parker said that it was impossible to hold that any money was actually paid to the company at all. He said that the three cheques passed through its hand, but that they were never part of the company's assets to do what it liked with, since the company was under an obligation to hand them over to the bank in discharge of the overdraft. The debentures were, therefore, to be issued to secure an antecedent independent transaction. They were to be issued on account of the guarantee.

Now, I think that the debentures in the present case were not to be issued to secure an antecedent independent transaction, but were given as part of one transaction in consideration of cash payments, which as they were paid became part of the company's assets to do what it liked with. It was borrowed for the purpose of enabling the

(1) [1910] 1 Ch. 758. (2) [1903] 1 Ch. 498.

company to carry on its business. There was no actual obligation on the company to hand over these sums to any person. They were not issued on account of any guarantee or to secure any antecedent independent transaction; and, as I have said, the learned Judge does not throw any doubt upon the decision of Mr. Justice Neville or the Court of Appeal in the *Columbian Fireproofing Case* (1), and I think that the facts of this case are within the principle of the decision in the *Columbian Fireproofing Case* (1), and that therefore the sums in question were advanced at the time of and in consideration for the charge within the meaning of sect. 212.

Then it is said that the deposit of the title deeds is void as creating a charge on the property and not registered within twenty-one days. The question for determination on this matter is as to the date upon which the title deeds were deposited as a security. Counsel for the liquidator says that, assuming that the resolution of the 9th December, 1920, did not create a valid equitable charge, still the deeds were deposited as security and the charge created on the 17th December, 1920; and, if this view be correct, the deposit is void, because no registration took place until the 1st of February, 1921. If the charge was created on the 14th January, 1921, by reason of the resolution of that date constituting a good equitable charge, then the registration on the 1st February was sufficient; or, alternatively, if the effective deposit took place on the 19th of January, 1921, then also, of course, the registration was in time.

The facts and documents have to be carefully examined before one can come to a conclusion on this matter. On the 17th December, 1920, the secretary of the company sent to the manager at Larne certain deeds and documents, specifying them, and saying nothing more. On the 22nd December, 1920, the manager at Larne sent to his directors the usual form of application for the overdraft of £50,000. One finds in this application the following statement:—"The deeds of Foundry and Curran Point have been left here. Please instruct me what to do with these." Then, on the 24th December, 1920, Mr. Walkington, solicitor for the bank, wrote a letter to Mr. M'Minch, the solicitor for the company, in which the following passage occurs:—"In addition to the resolution by the company there should also be a resolution by the directors authorizing the execution of the debentures and appointing some of their number to deposit the title deeds with the bank as security on behalf of the company." Then, on the 15th January, 1921, the manager at Larne sends to the directors of the bank a copy of the resolution of the 14th January as to the signing and issuing of the fifty debentures of £1,000 each, and appointing W. A. Buchanan, the secretary, to deposit the deeds of the company. On the 20th January, 1921, the manager writes sending the deeds to the head office, which Buchanan had handed over on the 19th of January.

One must now examine the oral evidence given by Mr. Cunningham, the manager of the bank at Larne. He said that it was on the 10th of December, 1920, that he first heard that the bank were to get a deposit of the title deeds. He says the secretary of the company told him so; that he heard nothing further about it until the 17th of December. He says that on that date a parcel was left on the

(1) [1910] 1 Ch. 758.

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counter by a messenger boy, with the letter of the 17th December from the secretary of the company; that he opened the parcel and telephoned to Mr. Fullerton, the chief inspector of the bank, to ask what he was to do with the deeds, and that Mr. Fullerton said he was looking into the matter and would let him know. He says he put the parcel into the safe. He says that on the 22d of December he sent to the head office the form of application for the loan filled up, which contains the statement as to the deeds to which I have referred.

He says that on the 14th of January, 1921, he received the letter from the secretary of the company, with a copy of the resolution of the directors of that date. That on the 20th of January, 1921, the secretary of the company called and told him that he had been appointed to hand over the deeds in conformity with this resolution; he says that he then opened the parcel, went over the schedule, and checked the list with the deeds. He says there was a memorandum of deposit dated 20th January; that the deeds were received by the head office on the 21st of January. He referred to the security book kept at this branch, which contains the following entries:—"Olderfleet. First security, 22nd December. Five guarantees. Debentures receipt of February 21st, 1921. Deposit of title deeds, January 20th, 1921."

Cross-examined by Mr. Overend, he said that on the 10th December, 1920, he got instructions by telephone to honour cheques up to £50,000. The application referred to was a mere formality between the head office and the branch. He knew on the 10th of December a deposit would be made. He says when he got the letter of the 17th December he knew that the deeds mentioned were the deeds to be deposited. He said, "I put them away until I knew how they were to be properly deposited. I then rang up Mr. Fullerton. I told him the parcel of deeds had been left in by a messenger boy of the Olderfleet Company. He said they would require to be deposited by some responsible party of the shipbuilding company, and to await further instructions. I understood I was to keep the deeds. I told him that the parcel had been left up from the secretary of the company. He said the parcel was put into the inner safe where there were other deeds. He said that from the 10th of December he had been honouring cheques for large amounts; that from the 10th of December to the 31st of December payments were made up to £59,000. He said that after the 17th December he would not have given back the deeds," but, he added, "I did not regard them as security"; of course Mr. Cunningham, who was a subordinate officer, would not take the responsibility of parting with the deeds without instructions from the head office. He says that on the 20th of January he took Mr. Buchanan, the secretary of the company, into the inner office; that when the deeds were checked he parcelled them up again; he then handed them to Mr. Buchanan, and Mr. Buchanan then handed them to him, and that he sent them on to the head office that night.

Re-examined by Mr. Wilson, he said that deeds left for safe keeping are held at the branch, but that deeds given as security for an overdraft he sends to the head office. No doubt an agreement to mortgage with a subsequent delivery of the title deeds will amount in equity to a mortgage, and will be effectual from the time of the agreement,

and counsel for the liquidator relied upon the decision in *Edge* v. *Worthington* (1), where the deeds were deposited for the purpose of preparing a legal mortgage, in order that a previous agreement to give a mortgage might be completed. But there was here, in my opinion, no valid agreement to mortgage prior to the resolution of the 14th of January, and no valid deposit of the title deeds until the 19th of January, and the correspondence and the whole course of business in regard to the matter between the bank and the company is only consistent with the view that the bank required this resolution, and required the directors to authorize some person on their behalf to make the deposit, and the sending of the deeds by a messenger to the manager at Larne on the 17th of December was not an act done in pursuance of any valid agreement, but for the purpose of convenience and pending the passing of a resolution of the directors and an appointment by them of some person authorized on their behalf for that purpose.

Lord Selborne said in *Dixon* v. *Muckleston* (2) that the mere possession of deeds without evidence of the manner in which the possession originated so that a contract will be inferred will not be enough to create an equitable mortgage. Here the bank say there must be a resolution of the directors authorizing the deposit, and they conduct the business on that basis, and they take the deposit from the person so authorized by the resolution. I think that this handing over by Buchanan was the transaction which the bank regarded, and rightly regarded, as the valid deposit of the title deeds creating the equitable mortgage.

Counsel for the liquidator relied upon the case of *Essberger & Son, Ltd.*, v. *Capital and Counties Bank* (3). On September 10th, 1910, the company, being in need of an overdraft, deposited the title deeds of its property with its bankers, the defendants, with a letter of the same date containing an authority from the chairman of the company to the secretary to deposit the deeds with the bank. The company on September 17th, 1910, sealed, and subsequently delivered to the bank a memorandum of the deposit of the deeds containing a charge to secure the overdraft, and an agreement to execute a mortgage when called upon. The document was not dated, but it was executed in proper form; and a resolution was passed which was at a later date forwarded to the bank, to the effect that the memorandum of deposit had been signed and sealed. Then the overdraft was continued, and on or about June 14th, 1911, the document was sent back to the company, two directors of which initialled the schedule of the deposited documents. The document was then returned to the bank, the manager of which filled in the date, June 14th, 1911. This document was registered on July 3rd, 1911. Further advances were made on the security of the memorandum after June 14th, 1911. In September, 1911, the company went into voluntary winding up, and on December 16th, 1911, an order was made for the continuance of the voluntary winding up under the supervision of the Court. In January, 1912, the liquidator demanded delivery up of the deeds. The bank refused to deliver them, and the action was brought, claiming delivery of the deeds to the company on the ground that neither the charge nor the

(1) 1 Cox, 211. (2) L. R. 8 Ch. 155. (3) [1913] 2 Ch. 366.

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memorandum had been registered in due time under sect. 93 of the Act of 1908. The bank alleged by its defence that a document purporting to be a memorandum of charge, with an agreement to execute a mortgage when called upon, was sealed with the seal of the plaintiff company, and signed on their behalf on September 17th, 1910, and subsequently delivered to the defendants, but that at the time of such delivery the said document bore no date and was intended to be imperfect, and was delivered to the defendants with the intention that the same should in case of necessity be filled up by the defendants, for which purpose they were duly authorized, and should thereupon become and be used by the defendants as a charge affecting the real property to which the deeds related. It was at the time in the contemplation and intention of the parties that the plaintiffs' overdraft would be shortly paid off, and that the security created by the deposit of the title deeds would be merely temporary; but it was then verbally agreed between the plaintiffs and the defendants that if the loan was to be a permanent one, then a more permanent security should be created by a memorandum of deposit. They further said that the loan not having been paid off as anticipated, and a more permanent security being required, the memorandum was subsequently, on June 14th, 1911, perfected by the insertion by the defendants or their agent in pursuance of the said authority given to them by the plaintiffs of the said date. June 14th, 1911, and the defendants claimed and alleged that by such insertion and perfecting of the memorandum it first became of full effect, and that by virtue of the same the defendants became entitled on that date to a specific charge thereby created, and they relied on the registration on July 3rd, 1911. Mr. Justice Sargent, referring to the document of charge given to the bank on September 17th, 1910, said that the document was executed in proper form, and a resolution of the company was passed, a copy of the minute of which was at a later date forwarded to the bank, and was to this effect:—"Signed and sealed memorandum of deposit of deeds with the Capital and Counties Bank." The only way in which the document of charge could be said to be at all defective was that it had no date. Then, the overdraft continued, and at a later date—namely, about June 14th, 1911, or a day or two before that—the document was, upon the request of the bank, or from something that was said, taken back or handed to the company, and two directors of the company proceeded to initial or to sign the schedule of documents which had been deposited. Of course, he said, that had no effect whatever as regards the validity of the document, but it might be useful to have it signed in case of dispute. The document was returned to the bank, and the date was then filled in as June 14th, 1911, by the manager of the bank without any further authority than that which had been impliedly given to the bank on September 17th, 1910, by handing to them the undated memorandum. The memorandum itself was in the ordinary common form used by the bank. The learned Judge said that it was contended by counsel for the liquidator that the loan secured by the document of September 17th, 1910, was really the same loan as that which had been secured by the letter of September 10th, 1910, and the previous deposit of the title deeds, and that as the previous security had not

been registered the security was necessarily bad (that would be under sect. 93). Mr. Justice Sargent said:—"I should not be prepared to decide in favour of that contention without hearing a great deal more argument than I have heard. It seems to me to be rather in conflict with what was said by Mr. Justice Buckley in the two cases of *In re Defries & Co.* (1) and *In re Cardiff Workmen's Cottage Co.* (2). But, as the matter does not in my opinion turn upon that, I say nothing more upon that point. The second point which is made against the bank is that the security which was actually executed on September 17th, 1910, and subsequently dated June 14th, 1911, was itself void by reason of non-registration. The document was registered within the proper period after the date of the creation of the charge if that date was June 14th, 1911, but a long time after the expiration of the proper period if the date of the creation of the charge was September 17th, 1910. Now it seems to me that prima facie that point is a good one, because it is not necessarily an essential part of a deed that there should be a date to it; the date of the execution can be proved aliunde. A deed that has been executed, and has been delivered to a person in whose favour it is intended to operate is perfectly complete without having any date upon it, and therefore the addition of the date was not material to the operation of the deed. In my opinion, he says, from the time when the deed was in fact executed and handed to the bank—namely, September 17th, 1910—the bank had a complete and valid operative charge upon the property for the amount purporting to be secured by the deed. Where there is in fact an instrument creating or evidencing a mortgage or charge, I feel clear that on the true meaning of that section—sect. 93—the date of the creation of the mortgage or charge is the date when that instrument was executed, and is not the date when any money is subsequently advanced so as to make an effective charge for the amount of that money."

As I have held that there is in fact no instrument creating or evidencing a mortgage or charge in the present case at any time prior to the resolution of the 14th of January, 1921, and no effective deposit of the title deeds until the deeds were formally handed over by Mr. Buchanan, together with the memorandum of deposit on the 19th January, in pursuance of that resolution, I do not think that this case is an authority in favour of the liquidator, and I must hold that the contention of the liquidator on this point also fails. It follows from what I have said as to the debentures that the contention that the deposit of title deeds is a fraudulent preference also fails. Then it is said that the resolution of the 14th January, 1921, is invalid by reason of the fact that two directors who were guarantors were disqualified from voting by reason of their being interested in the subject-matter of the resolution, and that without their votes there was no quorum. It is true that there would not be the necessary quorum if the votes of these gentlemen were not valid, and the question is whether they were invalid by reason of their being interested. I do not think that this point was very strenuously insisted upon by counsel for the liquidator. They referred to the case of *In re Greymouth Point Elizabeth Railway and Coal Co., Ltd.* (3).

(1) [1904] 1 Ch. 37. (2) [1906] 2 Ch. 627. (3) [1904] 1 Ch. 32.

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In that case the articles of the company provided that any director might enter into a contract or be interested in any business of the company, but that no director should vote on any matter relative to the contract or business with the company in which he was interested, and that two directors should be a quorum for the transaction of business. It was held that a quorum of directors meant a quorum competent to transact and vote on the business before the board, and that therefore a resolution passed at a meeting of three directors on December 10th, 1897, two of whom were interested in the subject-matter of the resolution, was invalid. The two directors were obviously interested, because the resolution provided for the issue to them of debentures to the value of £1,200. Farwell J. pointed out that there were three directors present at the meeting held on December 10th, 1897, and he said he took it that they voted for giving debentures as security to two of themselves in consideration of a large sum of money then owing to the two directors, and a small sum of money then advanced or to be advanced. He said the giving of security was a matter on which two of the directors could not vote under article 106, and that, moreover, if there had been otherwise a quorum the other directors would be justified in asking them to retire while the question of giving them security was discussed, because they were interested against the company, and he held that the two directors were not capable of voting on the question, and therefore there was no quorum and no valid contract for the issue of the debentures to the two M'Donnells.

The resolution in this case, that is, the resolution of the 14th January, 1921, is impugned on the grounds set out in the notice of the 1st July, 1921, that it was of no effect, being passed at a meeting of the directors at which there was no effective quorum, as two of the directors present were interested in the subject-matter of the resolution; but that is not sufficient to disqualify them from voting. They must be interested against the company. Sir Richard Baggaley in his judgment on *North-West Transportation Co.* v. *Beatty* (1) says: "A director of a company is precluded from dealing on behalf of the company with himself, and from entering into engagements in which he has a personal interest conflicting, or which may possibly conflict, with the interest of those whom he is bound by fiduciary duty to protect."

I do not think that the two directors here by reason of being guarantors, or having agreed to become guarantors for the company to the bank, were either interested against the company or had a personal interest conflicting with those whom they were bound to protect.

For these reasons I am of opinion that the summons must be dismissed with costs.

Solicitors for the liquidator: *Porter, Morris, & Co.*
Solicitor for the Ulster Bank: *Hugh H. Smiley.*

C. N. K.

(1) 12 A. C. 589, at p. 593.

IN THE MATTER OF THE TRUSTS OF A SETTLEMENT DATED JUNE 28TH, 1871, ON THE MARRIAGE OF ROBERT TANKERVILLE WEBBER AND ISABELLA FRANCES WINGFIELD; AND IN THE MATTER OF THE TRUSTS OF THE WILL OF THE SAID ROBERT TANKERVILLE WEBBER, DECEASED.

M. R. 1922. Feb. 14.

BETWEEN WILLIAM DOWNES WEBBER, GEORGE POMEROY ARTHUR COLLEY, AND HENRY COLE BOWEN, PLAINTIFFS; AND ISABELLA FRANCES WEBBER, MERVYN R. HOWE WEBBER, ADELAIDE ISABELLA GLEDSTANES, EDWARD HORNIDGE, ARTHUR DANIEL WEBBER, NORAH MORRIS, ANTHONY JAMES MORRIS, AND WILLIAM HUGH COOKE, DEFENDANTS.

(1922. No. 56.)

Marriage settlement—Trust fund—Unauthorized exercise of power of investment.

By antenuptial settlement of 1871, on the marriage of R. and W., R. granted certain freehold lands in Ireland to trustees to the use of himself for life and after his death, leaving issue, to the use that W. should receive a jointure charged upon all the premises "hereinbefore expressed to be hereby granted," and in default of children for R. absolutely. By the same settlement power was reserved to R. to appoint a jointure in favour of any after-taken wife to be charged on "the premises hereinbefore expressed to be hereby granted." By the same settlement the sum of £1,600 was assigned by W. to trustees upon trust to invest it in specified securities, and pay the income to R. for his life, and after his death to W. for her life, and subject thereto upon trust for such of the children as should attain the age of twenty-one, and in default of children upon trust for the survivor of R and W.

By the same settlement it was provided that the trustees might, at the request of R. and W., employ the £1,600 in the purchase of real estate to be held by them upon the same uses and powers "as are hereinbefore contained concerning the said premises hereinbefore expressed to be hereby settled." The fund of £1,600 was expended in the purchase of a freehold estate in Wales, which was conveyed to trustees by deed of 1902 (to which R. and W. were parties) upon trust that the trustees should hold the proceeds of such sale, and the rents and profits until sale upon the trusts declared by the settlement of the investments of the £1,600.

R. died leaving issue and W. him surviving. Five of the children attained the age of twenty-one, each of whom acquired a vested interest in one-fifth share in the lands settled by R. One, J. C. R., died a bachelor and intestate, and R. (his father) acquired his share as heir-at-law, and by his will devised all his real and personal estate not included in his marriage settlement upon trusts for sale to pay the income to W. (his wife) for life, and after her death for his children in equal shares.

Held, that the words in the clause of the settlement, "the premises hereinbefore expressed to be granted," meant the freehold lands in Ireland; and that the purchase effected by deed of 1902 was an unauthorized investment, and did not deprive W. of her life estate, and that the estate of J. C. R. passed by the testator's will.

ORIGINATING SUMMONS to determine whether the hereditaments in Co. Flint, Wales, purchased with £1,600 comprised in the marriage settlement of 28th June, 1871, ought to be held for and upon the uses, trusts, and powers by and in the said indenture limited and contained concerning the lands in Ireland or upon and with the trusts and powers by and in the said indenture in the first instance declared concerning the said sum of £1,600, and whether James Charles Noel Webber took a vested interest in fee simple in remainder in one undivided fifth part of the lands in Ireland comprised in the said

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indenture; and, if so, whether on his death intestate his interest in the said lands or the proceeds of the sale thereof devolved upon Robert Tankerville Webber as his heir-at-law or as his personal representative or sole next-of-kin.

If the said James Charles Noel Webber took such vested interest and his estate devolved upon Robert Tankerville Webber, whether such estate passed under the devise and bequest in the will of Robert Tankerville Webber of "all my real and personal estate not included in my marriage settlement and which is not hereby otherwise disposed of," and if such estate did not so pass whether it devolved upon his heir-at-law or personal representative.

The facts appear sufficiently from the judgment of the Master of the Rolls.

M'Carthy Mahony, for the plaintiffs, the trustees.

Leet, for Isabella Wingfield:—

In the events which have happened my client is not deprived of her life estate in the Welsh lands. The investment clause is framed in the widest possible way, and the purchase of the Welsh lands is merely an extension of this clause. "The trusts hereinbefore declared" are the trusts for investment, and it would not be natural that she should insert a clause which would take her whole fortune.

Oliver Murphy, for Adelaide Isabella Gledstanes, Norah Morris, and the trustees of her marriage settlement.

Poole, for Mervyn Howe Webber.

O'CONNOR M.R.:—

In this case the question for decision arises out of the investment of a wife's trust fund in the purchase of land in pursuance or professed pursuance of a power of investment contained in her marriage settlement.

The settlement was executed on the 28th June, 1871, and made on the marriage of Robert Tankerville Webber with Isabella Frances Wingfield. By this settlement (so far as it is material to state it) the husband granted and conveyed to the trustees thereof and their heirs certain lands in Ireland, to hold the said lands "described and expressed to be thereby granted" (words to which importance has been given) to the trustees and their heirs to the use of the husband and his heirs until the solemnization of the marriage, and thence to the use of the husband and his assigns for his life, and after his death, in the event of his not leaving issue living at his death, then as to part of the lands put in settlement to the use of the wife during her life; but in case the husband should leave issue living at his death (the event which happened), then to the use that the wife, should she survive him, should during her life receive the yearly rentcharge of £300 for her jointure, and in lieu of all dower to be charged upon all the premises "thereinbefore expressed to be thereby granted" (again words to which importance has been given), with powers of distress

and entry, and subject thereto after the death of the husband to the use of the child or children of the marriage as the husband should by deed or will appoint; and, in default of appointment by him, as the wife should by deed or will appoint, and, subject thereto, to the use of all the children and their respective heirs and assigns in equal shares as tenants in common, with gifts over between them, in the event of any of them dying under the age of twenty-one years without issue living at their respective deaths, with remainder to the use of the husband, his heirs and assigns for ever.

The settlement also gave power to the husband to appoint to an after-taken wife a jointure rentcharge not exceeding £200 per annum, to be charged upon all the premises thereinbefore "expressed to be thereby granted." The wife brought into settlement a sum of £1,600, and by the same settlement it was dealt with as follows:—It was assigned to the trustees (subject to the life estate therein, since determined, of her father) upon trust to allow it to remain in its then state of investment, or with the consent of the husband and wife or the survivors of them, or afterwards at the discretion of the trustees, to call it in and invest it in the stocks and securities in the settlement mentioned, and to pay the income to the husband during the joint lives of himself and the wife; and after the death of one of them to the survivor of them during his or her life, and after the death of the survivor of them to stand possessed of the said sum of £1,600 and the investments representing the same, and the annual income thereof, for the children or more remote issue of the marriage to be born during the lives of the husband and wife or the life of the survivor of them, or within twenty-one years after the death of the survivor of them, as the husband and wife should by deed or will appoint; and, in default of such appointment, as the survivor should by deed or will appoint; and, in default thereof, for such of the children as should attain the age of twenty-one years, or, being a female, should marry under that age, and if more than one, in equal shares.

Then comes a hotchpot clause, which clearly applies only to the wife's trust fund, because the parts to be brought into hotchpot are only those appointed "in pursuance of either of the powers lastly hereinbefore contained," viz., the powers given to the husband and wife jointly and to the survivor of them over the wife's trust fund.

Subject as above, there is an ultimate gift to the survivor of the husband and wife.

Then come advancement, maintenance, and accumulation clauses in common form. Stopping at this part of the settlement, I think that it is clear that the two parts, viz., that dealing with the real estate and that dealing with the personal estate, are two absolutely separate and complete compartments, that the provisions and clauses contained in one have no reference to the settled property contained in the other. This is a feature of the settlement which is to be borne in mind.

But the settlement contains a further clause which raises the question for decision. This is a provision and declaration that, notwithstanding the trusts thereinbefore declared concerning the wife's fortune, it should be lawful for the trustees, during the lives of the husband and wife, and the life of the survivor, upon their, his, or

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her request in writing, to invest all or any part thereof in the purchase of lands, to be held by the trustees upon the same uses and with and subject to the same powers as were thereinbefore contained concerning the said premises thereinbefore expressed to be thereby granted.

Now, what does this mean? Does it mean that the lands which should be purchased with the wife's fortune should be held upon the same trusts as those which were declared concerning it? or does it mean that the purchased lands are to be held upon the uses declared concerning the lands brought into the settlement by the husband? If it means the latter, very curious results must follow. The change of investment from money to land involves a considerable loss to the wife, as provided for her by the settlement by which she was entitled to a jointure out of the lands and a life estate in her own fund. She loses the latter. Another curious result would also follow. Her fortune would become subject to her husband's power to appoint a jointure to an after-taken wife. She would lose her right by survivorship to the capital in the event of there being no issue of the marriage.

These are certainly not results which one would expect to follow a mere change of investment of trust funds. They are results which are outside the scope and purpose of the ordinary investment clauses, and they involve such a loss to the wife that no one could expect that she would join in a request which would accomplish it.

If this, however, is the meaning of the settlement, it must be so construed irrespective of consequences. In support of the construction which would subject the lands purchased to the same uses as were limited by the settlement for the husband's lands I was referred to the declaration in the clauses that the purchased lands were to be held upon the same uses and with and subject to the same powers as were thereinbefore limited and contained concerning the said premises thereinbefore expressed to be thereby granted. It was pointed out that these words were used in the settlement in several places, and always in connexion with the lands, and never in connexion with the wife's fortune. This is so; but if it were the only thing to rely upon, I would have a difficulty in arriving at a result depending upon a very strict construction of words and involving a very unusual and unnatural change in the trusts.

There is, however, one consideration which seems to me to support this construction, no matter what may be the consequence. The forms in which the several clauses in the second part of the settlement are couched are not adapted to a settlement of lands. Hotchpot and advancement clauses require in a settlement of real estate ancillary powers for valuing the lands appointed and for raising the moneys required for advancement. I feel, therefore, forced to the construction which a literal and strict reading of the settlement enjoins. If, therefore, there was a purchase of lands with the wife's trust fund in pursuance of the trust, these lands become subject to the uses of the husband's lands, and she has lost her life estate in the fund. I must now inquire what has actually happened. The wife's fund was invested in the purchase of land in Wales, which was conveyed to the trustees of the settlement by indenture dated 15th August, 1902. By this conveyance, to which the husband and wife were parties, the lands were

conveyed, with their consent, to the trustees upon trust that they should, with the consent of the husband and wife during their joint lives, and of the survivors of them during his or her life and after the death of the survivor of them, at the discretion of the trustees, sell the lands and stand possessed of the proceeds of sale and the rents of the lands till sold upon the trusts, and subject to the powers and provisions contained in the settlement, and which were thereby declared and were then subsisting with respect to money forming part of the wife's trust fund thereby settled and the income thereof. By this conveyance the purchased lands were not conveyed to the uses of the settlement, which would have limited them to the same uses as were thereby declared concerning the husband's lands thereby settled. They were expressly limited to other uses—viz., in the first place, upon a trust for sale, to which the husband's lands were not subject, and subject to the trust for sale upon the trusts declared of the wife's trust funds. There was, therefore, no consent on the part of the wife to a purchase of lands in compliance with the powers contained in the settlement, which would have involved the forfeiture by the wife of all interest in her own fund. In result the purchase of the lands in the mode and subject to the conditions contained in the conveyance was an unauthorized investment, and the purchased lands can only be regarded as a security for the wife's trust fund, which has not lost its original character of personal estate, and remains subject to the original trusts declared by the settlement in respect of such fund. I therefore hold that she did not lose her life estate, which was limited to her by the settlement, and the Welsh estate, which represents her own fund, is subject to that life estate.

There is one other question of a minor character. There were five children of the marriage who attained the age of twenty-one years, each of whom, therefore, acquired a vested interest in one-fifth share in the lands settled by the husband, subject to being divested by an appointment by the husband or wife. One of them, James Charles Noel Webber, died a bachelor and intestate. His father, therefore, acquired his share as heir-at-law, subject to its being divested. By his will the father devised and bequeathed all his real and personal estate not included in his marriage settlement, and which was not by his will otherwise disposed of, to his trustees upon trust for sale, and after payment of expenses, debts, and legacies, to hold the residuary trust money upon trust to pay the income to his wife for life, and after her death for his children in equal shares. The question has been raised whether the share of the son, James Charles Noel Webber, which had devolved on the testator, was property not included in the marriage settlement. In a sense it was included therein, inasmuch as the lands were thereby settled, but the estate of the son, which had devolved upon the father, was a free estate and not a settled estate, and was as much assets of the father as any other part thereof. I therefore hold that the estate which the son, James Charles Noel Webber, took in default of appointment passed by the testator's will.

Solicitors for plaintiffs: *Lynch and Deering.*
Solicitors for Isabella Wingfield: *Wm. Fry & Sons.*
Solicitor for Adelaide Isabella Gledstanes: *Wm. J. Skinner.*
Solicitor for Mervyn Howe Webber: *Hamilton & Craig.*

R. R.

Wylie J. Land Com. 1922.

In the MATTER of the ESTATE of THOMAS PRITTIE COSBY. (E. C. 6286.)

March 14.

Will—Construction—Gift to one for life, and after his death "to his eldest legitimate male issue"—Gift over in default—Persona designata or nomen collectivum.

A testator left property (including realty) to his son W. for life, and after his death to his eldest legitimate male issue, in default of which to the eldest male issue of testator's late brother S., in default of which to the eldest male issue of his late sister R., in failure of her male issue to the eldest male issue of his late sister H., followed by directions as to jointuring, charging, etc., to whoever should possess the T. & S. estates. No disentailing deed was ever executed.

Held, that the phrase "eldest male issue" was a nomen collectivum, and not the description of a persona designata, and that the person entitled under the limitations in the will took as tenant in tail male.

Sheridan v. *O'Reilly*, [1900] 1 I. R. 386, distinguished.

Question of Law referred by the Examiner.

Thomas Phillips Cosby executed a will on August 21st, 1846, the material portion of which for the purpose of the present report was as follows:—"I leave and bequeath to my brother, William Cosby, for life all and any estates or money I have the right and power of leaving him . . . . after his death to descend to his eldest legitimate male issue, in default of which to the eldest male issue of my late brother, Sidney Cosby, in default of which to the eldest male issue of my late sister, wife of Horace Rochfort, Esq., of Clongrenane, in failure of her male issue to the eldest male issue of my late sister Harriet, wife of Frederick, Lord Ashtown, at the same time binding whoever possesses the Stradbally and Timahoe estates that they and their heirs do take and use the surname of Cosby; the possessor of the estate must also make Stradbally Hall his chief residence, and expend at least £300 annually in keeping up the house," etc. The testator then directed certain annuities, debts, and legacies to be paid by "whoever possesses the estates," and wound up by giving "the power of charging a fair and equitable jointure and portion for younger children on the estates, and also the power of granting any leases that may be for the benefit of the towns of Stradbally and Timahoe" (sic).

Thomas Cosby, father of the testator, who died in 1832, had six children, viz.. Thomas Phillips Cosby (the testator) his eldest son and heir-at-law, the Rev. William Cosby, Sidney Cosby, Wellesley Pole Cosby, Mrs. Rochfort, and Lady Ashtown. The testator died in 1851. The Rev. William Cosby died in 1872, leaving him surviving his only son, General Thomas Prittie Cosby, the late vendor (these proceedings being continued as to pending sales in the name of his widow, Anne Houldsworth Cosby, as his personal representative), who died in 1912 without issue. Sidney Cosby died in 1840, leaving an only son, Colonel Robert Ashworth Godolphin Cosby, who died in 1920, leaving as his eldest son and heir-at-law Captain Dudley A. S. Cosby, who is still living. Wellesley Pole Cosby died without issue in 1842. No disentailing assurance was ever executed affecting the lands. The

realty having been sold, the point arose as to the destination of the purchase-money which was lodged in Court. The question reserved for the Court by the Examiner was whether the words "eldest legitimate male issue" in the will of Thomas Phillips Cosby were words of purchase or of limitation—in other words, whether the Rev. William Cosby took a life interest with remainder in fee to the late vendor, or whether an estate in tail male in William Cosby was created, which under the limitations in the will became vested in Captain Dudley A. S. Cosby.

Jellett K.C., for Mrs. Anne Houldsworth Cosby, as universal legatee and devisee of the late vendor:—

I submit that the effect of the will was to give an estate for life in the lands to William Cosby, with remainder in fee to the late vendor. Apart from decisions, that would be the common-sense view. There are, I admit, many cases of a similar kind where it was held that an estate tail was created. But the word "eldest" suggests a reference to a persona designata. One can easily ascertain a particular person answering the particular description. "In default of which" must mean "in default of eldest legitimate male issue," the person who was to take on the death of the tenant for life; the antecedent to "which" is the whole four words. The only place where "eldest" is left out—possibly by inadvertence—is in the limitation on failure of Mrs. Rochfort's male issue. Further, the clause is not confined to realty, and the rule in *Shelley's Case* (1) does not touch personalty, which in this case went to William for life, with remainder to his eldest son. Are two kinds of property, covered by the same language, to go in different directions? In *Sheridan* v. *O'Reilly* (2) the question whether there was a gift to a persona designata or not was not argued in the Court of Appeal; the only question was the point of time at which the persona designata was to be ascertained—whether at birth or on the death of the tenant for life. Porter M.R. (at p. 391) discusses the effect of the word "eldest." *Sheridan* v. *O'Reilly* (2) was considered by Wylie J. in *Finlay's Estate* (3), and distinguished, as was also *Lovelace* v. *Lovelace* (4): see judgment at p. 149, et seq. In *Lewis* v. *Puxley* (5) the intention of the testator was clear; but in that case Parke B. says (at p. 741): "If the only clause in the will had been the bequest of the real estate to John for life and to his eldest son after his death, that would probably have been, as Mr. Rudall contended, an estate for life to John, with remainder in fee to his eldest son." See also the judgment of Yelverton C.B. in *Mandeville* v. *The Earl of Carrick* (6). There is nothing to indicate that the eldest legitimate male issue could take as tenant in tail.

[WYLIE J.: Unless you read in "one after the other," or some such words.]

But there is no reference whatever to the issue of the "eldest legitimate male issue."

[WYLIE J.: What would have happened if William Cosby had had no son?]

(1) 1 Rep. 101.
(2) [1900] 1 I. R. 386.
(3) [1913] 1 I. R. 143.
(4) Cro. Eliz. 40.
(5) 16 M. & W. 733.
(6) 3 Ridg. 352, 363.

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There would have been a gift over on failure in each case, the takers being personae designatae. On the other hand, if an estate tail were created, on default of issue male of Thomas Prittie Cosby there would be a gift over to Colonel Robert Ashworth Godolphin Cosby, on whose death the estate would descend to his son, Dudley A. S. Cosby, the legitimus contradictor in this case. The exposition of the will must be founded on the whole instrument, and be made ex antecedentibus et consequentibus: see the judgment of Lord Ellenborough C.J. in *Right*, dem., *Compton* v. *Compton* (1). I submit that the money in Court passed through Thomas Prittie Cosby to his widow and universal legatee, Anne Houldsworth Cosby.

Garrett Walker K.C., for Dudley A. S. Cosby:—

No disentailing deed having been executed, the effect of the devise was, I submit, to make William Cosby tenant in tail male of the lands, and in the events that have happened under the limitations in the will the estate became vested in my client as eldest male issue of Colonel Robert A. G. Cosby. The judgment of Sir Edward Sullivan M.R. in *O'Hanlon* v. *Unthank* (2) is an answer to the last case cited on the duty of the Court in construing a will. If the testator in this case had stopped after the limitation to the eldest legitimate male issue of William Cosby, there would be some difficulty, but what follows puts the matter beyond all doubt. The scheme was to provide for the issue not only of William Cosby, but also of his brother and two sisters. It is argued on the other side that this is a gift of a life estate to William Cosby, with an absolute estate in fee to General Thomas Prittie Cosby. Then what is the meaning of the subsequent limitations? There is no question here of a springing use or executory devise. The words of the gift are peculiarly appropriate to the creation of an estate tail. "Default of which" must mean default of issue. Further, the directions to "whoever possesses the Stradbally and Timahoe estates" and their heirs are wholly inconsistent with a gift in fee, but would be natural in the case of an estate tail. Finally, the testator gives—presumably to the owner of the estate for the time being; the words are left out—certain powers of charging and jointuring, unnecessary in the creation of an estate in fee, but natural in the case of an estate tail. If there is anything in the argument that "eldest" implies comparison, the Rev. William Cosby had only one son. If the latter is a persona designata, he would take a vested interest on the death of the testator: *Sheridan* v. *O'Reilly* (3), which would have the absurd result of creating successive gifts in fee simple. I submit that the Court is not coerced to hold that "eldest" of necessity points to a definite person, and to disregard the other clauses in the will. The only authority to support such a view is *Lovelace's Case* (4), a decision on which considerable doubt has been cast. Suppose that Mr. Jellett's argument on this point were right, then what would happen if Thomas Prittie Cosby had predeceased his father? The word "issue" is prima facie a nomen collectivum, a word of limitation and not of purchase: *King* v.

(1) 9 East, 267, 272.
(2) I. R. 7 Eq. 68, 79.
(3) [1900] 1 I. R. 386.
(4) Cro. Eliz. 40.

Melling (1), judgment of Sir Matthew Hale C.J., at p. 231. See also *Burley's Case* (2), cited in Sir Matthew Hale's judgment in *King* v. *Melling* (3), *Dubber* v. *Trollop* (4). In *Oddie* v. *Woodford* (5) Lord Eldon C. discusses the meaning of "eldest male descendant" at p. 614. There is nothing sacrosanct about the word "eldest": here it merely indicates the ordinary devolution of an estate tail. The material distinction in *Lovelace's Case* (6) is that there was no gift over. I submit that *Lewis* v. *Puxley* (7) is a strong authority in my favour. There the word was "son," a much more distinctive word than "issue," yet "eldest legitimate son" was held a nomen collectivum. In determining whether an estate tail is created or not, it is important to see whether there is a succession of estates. Here the gift over would not take effect as long as there was issue living of the Rev. William Cosby. *Doe*, dem., *Garrod* v. *Garrod* (8) is inconsistent with *Lovelace's Case* (6).

[WYLIE J.:—What effect am I to give to "eldest" if I follow you?]

The word merely indicates the ordinary devolution of an estate tail. *Sheridan* v. *O'Reilly* (9) is an unsatisfactory report. The arguments in the Court below are not given, and the question supposed to have been decided was not raised by the summons. Further, there was no gift over in favour of collaterals as here. There is no meaning in giving a vested estate in fee with gifts over. Leaving out of consideration for the moment the word "eldest," it is difficult to imagine more typical examples of successive estates tail, especially having regard to the conditions of residence, and taking the name of Cosby, which are quite consistent with the creation of an estate tail, but not with the creation of an estate in fee. A condition against alienation is an argument against the creation of an estate in fee: *Magee* v. *Martin* (10); a fortiori the creation of a succession of estates. In *Mandeville's Case* (11) the words of the will were different—"for his life only."

Jellett, in reply:—

There is a gift over in *Sheridan* v. *O'Reilly* (9), as here. The word "descend" is just as applicable to an estate in fee as to an estate tail. The word "heirs" in the will suggests an estate in fee. The fact that the personalty must go one way is a strong argument that the realty goes the same way.

WYLIE J.:—

I have come to a definite conclusion in this case, and I do not think there is anything to be gained by reserving judgment. The question I have to decide is this: Is the phrase "eldest male issue" a description of a persona designata or is it a nomen collectivum? In

(1) 1 Ventris, 225.
(2) 43 Eliz.
(3) 1 Ventris, 225, at p. 230.
(4) 8 Vin. Abr. 233.
(5) 3 My. & Cr. 584.
(6) Cro. Eliz. 40.
(7) 16 M. & W. 733.
(8) 2 B. & Ad. 87.
(9) [1900] 1 I. R. 386.
(10) [1902] 1 I. R. 367.
(11) 3 Ridg. 352.

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other words, can I read it as equivalent to "eldest son"? The case most like this is *Sheridan* v. *O'Reilly* (1); but that case is distinguishable. True, there is here, as there was in that case, a mixed fund, and the appointment of an estate for life, with a gift over. But then comes the difference—the testator has created limitation after limitation, and has further added clauses, especially those relating to charging and jointuring, which are wholly inconsistent with the idea of an estate in fee. Looking at the will as a whole, I think it is clear that the testator never intended to give William Cosby's eldest son an estate in fee, but rather, as far as he could, to tie the property up among the family by creating these various limitations. I hold that the devise did not create an estate for life followed by an estate in fee, but an estate in tail male; and that in the events that have happened under the limitations in the will Mr. Walker's client is entitled as tenant in tail male.

Solicitor for Mrs. A. H. Cosby: *Nathaniel Taylor.*
Solicitors for Dudley A. S. Cosby: *Darley, Orpen, & Synnott.*

T. C. T.

(1) [1900] 1 I. R. 386.

IN THE MATTER OF THE ESTATE OF JAMES WALL, DECEASED. BETWEEN JAMES LENEHAN, WILLIAM TAAFE, AND JOHN LENEHAN, PLAINTIFFS; AND JAMES WALL AND CHRISTOPHER WALL, DEFENDANTS.

M. R. 1922. Feb. 16.

(1921. No. 933.)

Ademption—Will—Resulting trust—Advancement—Double portions.

A testator bequeathed certain legacies to his daughters, his son W., and a sister. He further devised and bequeathed to his son C. a sum of £600 and a farm at The Moors, D. In the event of C. dying before attaining twenty-one years of age, the testator gave and devised the said sum of £600 and the farm to his son J., and in the event of J. dying before attaining twenty-one years of age to his son W.

By his will he further devised and bequeathed a sum of £700 and a farm situate at C. to his son J., and in the event of J. becoming entitled to the said legacy of £600 and the farm at D., or in the event of J.'s death under twenty-one, gave and devised the said sum of £700 and the farm at C. to his son W. The testator devised and bequeathed his residuary real and personal estate to such of his children as should be living at his death. He died on 14th August, 1921. On the 15th November, 1919, the testator had entered into a contract for the purchase for the sum of £4,750 of a farm at K., which by his direction was conveyed by the vendor to the testator's son J. This was after inquiry adjudged to be an advancement to J.

Held, that the bequest of the legacy of £600 and the devise of the farm at C. had not been adeemed by the conveyance of the farm at K.

ORIGINATING SUMMONS by the executors of James Wall, deceased, for the purpose of determining whether a legacy of £700 bequeathed by the said James Wall, and a devise of the testator's farm situate at The Commons, Duleek, to his son James Wall, or either of the said gifts, was adeemed by the effect of a certain indenture of the 11th February, 1920, whereby the said testator caused to be conveyed to the said James Wall part of the lands of Keenogue, situate in the County Meath.

The summons was amended by including an application for administration of the real and personal estate of the deceased, all inquiries except one, as to whether Keenogue formed portion of the testator's real estate, being dispensed with.

By his will, dated 9th November, 1917, James Wall bequeathed certain pecuniary legacies to his daughters, his son William, and to a sister. He devised and bequeathed to his son Christopher a sum of £600 and a farm at The Moors, Duleek, together with the household furniture, farming stock, and implements of husbandry therein at his death, and in the event of the son Christopher dying before attaining the age of twenty-one years, the testator gave and devised the said legacy of £600, the said farm at The Moors, and the said household furniture, farming stock, and implements of husbandry to his son James Wall, and in the event of his dying before attaining the age of twenty-one years, the testator gave, devised, and bequeathed

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the said farm and chattels to his son William Wall. The testator further devised and bequeathed a sum of £700, a farm situate at Commons, with the farming stock and implements of husbandry thereon, to his son James Wall; and in the event of James Wall becoming entitled to the said legacy of £600, the farm at The Moors and the said chattels thereon by reason of the death of Christopher under the age of twenty-one years, or in the event of the death of James under the age of twenty-one years, gave, devised, and bequeathed the said legacy of £700, and the said farm at Commons, with the said chattels thereon, to his son William.

The testator devised and bequeathed his residuary, real, and personal estate in equal shares to such of his children as should be living and unmarried at his death. At the date of his will he had no estate or interest in the farm of Keenogue. On the 15th November, 1919, he entered into a contract for the purchase of the farm of Keenogue at the price of £4,750, and by his directions that farm was conveyed by the vendor to the testator's son James by conveyance, dated 11th February, 1920. The purchase-money was paid by the testator. Although the lands were conveyed to James, the testator went into possession, and remained in possession thereof and enjoyed them up to his death, which occurred on the 14th August, 1921.

James had not attained the age of twenty-one years at the time of the purchase. He attained twenty-one on the 21st September, 1920.

W. G. Shannon, for the plaintiffs, trustees of the will.

M'Cann K.C., for Christopher Wall, who had been appointed to represent the legatees and residuary legatees, some of whom were minors:—

The devise of Commons was adeemed by the gift of Keenogue. In 1917 the testator made a careful apportionment of his property among his children. If there was no ademption, there would be a deficiency in the amount available for the payment of the legacies. It is inherently improbable that in spending £4,750 in 1920 it was the testator's intention to produce that result. The statements in the text-books, that a devise of lands cannot be adeemed by a gift of land, rest solely on the supposed authority of *Darys* v. *Boucher* (1). That was a case of provisions ejusdem generis. The opinion of Alderson B. at p. 411 is merely a dictum founded on an erroneous view of sect. 6 of the Statute of Frauds (29 Car. 2, c. 3). The corresponding section of the Wills Act, sect. 20, applies to both real and personal estate; and if Alderson B.'s view is correct, then all the cases since the Wills Act in which it has been held that there was an ademption have been wrongly decided. The nature of the properties bequeathed and given does not matter provided they were both given as portions: *In re Lacon* (2). In the present case the farms were portions and intended as such, and the gifts were ejusdem generis. [He also referred to *In re Furness* (3); *Dawson* v. *Dawson* (4).]

(1) 3 Y. & C. Ex. R. 397.
(2) [1891] 2 Ch. 482, per Romer J., at p. 487.
(3) [1901] 2 Ch. 346.
(4) L. R. 4 Eq. 504.

Poole, for James Wall:—

The law with regard to ademption of gifts and the presumption against double portions is laid down in Williams on Executors, vol. ii, p. 1070 (eleventh edition). The doctrine is limited to personal estate, and real estate cannot be the subject of double portions: *In re Lacon* (1); *Preston* v. *Gorman* (2). It is not unreasonable to treat the gift of Keenogue as a money gift; there is no community of interest between the £700 and Keenogue, and the purchase of Keenogue is prima facie an advancement by the father to the son..

O'CONNOR M.R.:—

This is a suit for the administration of the real and personal estate of James Wall, late of The Moors, Duleek, in the county of Meath, farmer, and the question arises whether lands known as Keenogue, containing 61 acres 2 roods 32 perches, held in fee-simple, form part of his real estate.

[His Honor stated the facts as above set out and continued.]

James now maintains that on the execution of the conveyance he became entitled to the farm of Keenogue. The residuary devisees maintain that it is part of the testator's residuary estate. In my opinion there is no doubt whatever about the right of James to the farm. It is settled law that a purchase by a father in a child's name is prima facie an advancement by the father to the child, and that there is no resulting trust. In order to set up a resulting trust there must be evidence that the intention of the father was to create a trust for himself. There is no evidence of the kind here. The whole onus is thrown on the parties assenting to the trust, and that onus has not been discharged. Indeed, any evidence there is supports the intention to advance, but it is unnecessary to refer to it.

It was also contended that the conveyance of the farm of Keenogue to James operated as an ademption of the benefits which he took under the will. Now, the benefits which he took under the will were another farm, the chattels thereon, and a sum of £700. This contention involves the proposition that a devise of one parcel of land may be adeemed by the mere gift of another parcel of land without any expression of intention. There is no authority for this, and to so hold would be an unwarranted and dangerous extension of the rule against double portions.

As to the legacy of £700, it would be idle to suggest that it was adeemed by the gift of the farm, because it is elementary that money is not adeemed by land unless indeed a money value is put upon the gift. If the money which was the price of the farm had been given to James, there might then have been a case for the ademption of the legacy of £700, but the price of the farm was not given to James. The only thing that was given to him was the farm. I must therefore hold that there was no ademption.

Solicitors for the plaintiffs: *Smyth & Son.*
Solicitors for the defendant James Wall: *Hunter and Burland.*
Solicitor for the defendant Christopher Wall: *M. J. Kierans.*

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(1) [1891] 2 Ch. 482.

(2) 13 Ir. Ch. 329.

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June 8.

KELLY *v.* DUFFY.
(1921. No. 241.)

Vendor and Purchaser—Specific performance—Vendor not having any title—Breach of contract—Deceit not pleaded—Damages for loss of bargain not recoverable.

The vendor agreed with the purchaser for the sale of certain leasehold premises, and the purchaser paid a deposit on his purchase-money. At the date of the agreement the vendor had no interest in the premises agreed to be sold. The vendor died without having completed his contract. In an action by the purchaser against the vendor's personal representative for specific performance and damages:

Held, that the action being founded upon breach of contract and not upon fraud or deceit, the damages awarded in lieu of specific performance must be confined to the loss occasioned to the purchaser by the vendor's failure to complete.

Bain v. *Fothergill* (L. R. 7 H. L. 158) applied. *Day* v. *Singleton* ([1899] 2 Ch. 320) distinguished.

ACTION.

On November 25th, 1918, Patrick Duignan, who was the lessee of the house and premises known as St. Gerard's, 83 Iona Road, Dublin, held by him at the yearly rent of £7 6*s*., agreed to sell his interest in an unexpired term of years to Mrs. Teresa Kelly, the plaintiff, for the sum of £820, and received from her £100 as a deposit, the sale to be closed and clear possession given on December 28th, 1918. On the 20th of March, 1918, Patrick Duignan had assigned the premises on trust for the Superioress of the Ballinamore Convent, Co. Leitrim, to be applied towards the maintenance and support of the convent for carrying on its charitable and educational work. This assignment was disclosed and relied upon in the defence. Patrick Duignan died on November 16th, 1919. The plaintiff now sued the defendant as personal representative of Patrick Duignan for specific performance of the agreement and for damages for loss sustained by the delay in carrying out the agreement.

Herbert Wilson K.C. (with him *Devitt*), for the plaintiff:—

In the circumstances we are entitled to general damages. The rule in *Flureau* v. *Thornhill* (1) only applies where the vendor failed to complete without any fault of his own.

[He also referred to *Day* v. *Singleton* (2) and Fry on Specific Performance (pars. 1311, 1312); *In re Daniel*, *Daniel* v. *Vassall* (3).]

Battersby K.C. (with him *C. S. Campbell*):—

The claim for specific performance has failed, and the plaintiff is therefore not entitled to damages for delay, but only to damages for investigating title. We rely on *Bain* v. *Fothergill* (4), affirming *Flureau* v. *Thornhill* (1). The claim being purely one for specific performance, and the plaintiff being unable to sustain that claim, is not entitled to costs, at any rate after defence wherein the defendant's case was clearly brought to his notice.

(1) 2 W. Bl. 1078.
(2) [1899] 2 Ch. 320.
(3) [1917] 2 Ch. 405.
(4) L. R. 7 H. L. 158.

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O'CONNOR M.R.:—

This was an action by a purchaser against the personal representative of a vendor for the specific performance of an agreement for the sale of land, and for damages for loss sustained by the delay of the vendor in carrying out the agreement. There is a claim also for further and other relief.

The subject-matter of the agreement is a dwelling-house and premises, situate on Iona Road, Drumcondra, in the City of Dublin. The tenement is held under a lease for 990 years at the yearly rent of £7 6s., and the price was fixed at £820.

In addition to traverses of the cause of action, special defences were pleaded. One was that the vendor was to the knowledge of the plaintiff of unsound mind and incapable of understanding the agreement, and that he had no independent advice; another was that the contract was rescinded; another that the plaintiff by accepting a return of a deposit of £100 made in part payment of the purchase-money waived his right under the agreement. But none of these special defences was insisted upon at the trial, and I may therefore disregard them, and direct attention to a further special defence on which the action turns.

It was pleaded that at the date of the agreement the vendor was not the owner of and had no interest in the premises agreed to be sold, the same having been previously conveyed by the vendor to trustees for the Convent of Mercy, Ballinamore, by two indentures dated respectively 20th March, 1916, which were duly registered.

It goes without saying that if the vendor had no estate or interest in the premises, he could not have carried out his agreement, nor could his personal representative, the defendant. The action should, therefore, fail so far as it claimed specific performance, and the only relief open to the plaintiff would be in damages for breach of contract.

It was open to the plaintiff on getting the statement of defence to call immediately for production of the indentures referred to, or to get discovery of documents. The plaintiff did get discovery, and copies of the two indentures were discovered. On reading the copies (which were admitted) it clearly appeared that the vendor at the time he entered into the agreement had no estate in the premises, because he had previously parted with any estate he had.

The first of the indentures mentioned is made between the vendor, therein called the grantor, of the one part, and the Most Rev. Dr. Finnegan, Roman Catholic Bishop of Kilmore; the Rev. Francis M'Kiernan, Parish Priest of Ballinamore; the Rev. Mother Margaret Mary Carlos, Superioress of the Convent of Mercy, Ballinamore; Sister Mary Catherine Ryan and Sister Mary Patricia Gilferman, members of the convent, and therein called the grantees, of the other part. It recites the lease, and that all the estate and interest of the lessee therein had become vested in the grantor, and that he had agreed to assign to the grantees the leasehold interest in consideration of the covenants by the grantees therein contained. It then witnessed that the grantor, in pursuance of the agreement, thereby assigned to the grantees the demised premises, to hold to the grantees, their executors, administrators, and assigns for the residue of the term of 990 years, subject to the rent and to the covenants and

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conditions therein reserved and contained ; and the grantees covenanted with the grantor for the payment of the rent and the observance and performance of the covenants.

Contemporaneously with this indenture there was executed another indenture, which was made between the grantees in the first indenture of the one part, and the grantor therein—viz., the vendor in the agreement—of the other part, whereby it was recited that the Order of Mercy have a convent at Ballinamore, and that the entire purposes and duties of the said order and of the said convent are fully and entirely devoted and appointed to works of charity and benevolence in and about the town of Ballinamore and adjoining districts, and that the said order and the said convent educate such poor persons as attend their schools without fee or remuneration, and that the nuns of the said convent attend the sick and infirm and administer care and consolation to the dying, and give charity by alms or otherwise to poor persons without reference to creed ; and that the grantor was desirous of aiding the convent in their works of charity and mercy, and had by an indenture of even date assigned the premises to the grantees to the intent that they should hold the same until sold, and when sold should hold the proceeds of sale and the investments representing the same upon the trusts thereinafter declared. It was then declared that the grantees should hold the premises upon trust to pay the net annual rents until sold to the superioress of the convent, to be applied towards the maintenance and support of the convent for carrying out the charitable and educational works of the convent, and it was also declared that the grantees might sell the premises and hold the proceeds and investments representing same upon the like trusts.

It is obvious that once these indentures were disclosed to the plaintiff, she must have recognized that she could not obtain the relief of specific performance ; but she, nevertheless, went to trial claiming specific performance and specifically claiming only such damages as were caused by delay. It was open to the plaintiff to amend the statement of claim, but she did not do so. The action came on for trial, and the facts I have mentioned were proved. It was also proved that the vendor had previously to making the gift to the convent I have mentioned granted the premises to the members of another convent, but had got a reconveyance from them which they were entitled to make, as no charitable trust in that case was declared.

It appeared, and I was satisfied by the evidence given, that the vendor was an eccentric, wayward, and uncertain old gentleman, who would give a thing one day and would like to take it back the next. It was not alleged in the statement of claim that when he entered into the contract for sale he knew that he had no title, but I was asked to infer this, and that he wilfully led the plaintiff into a trap—was, in fact, guilty of a breach of the duty which every vendor owes to a purchaser, and practised a deceit. I was of opinion that before any such case could be made the statement of claim should be amended, but no amendment was applied for. There was, no doubt, a strong prima facie case of wilful default or intentional deceit ; but the miscarriage may have been the result of crass ignorance, because

it was proved that the plaintiff, having repented of the gift to the Ballinamore convent, as he did in the previous case, got back the two indentures from the nuns, who were quite willing to reconvey to him; but they could not have done so legally, having regard to the trusts declared. If there had been an application to amend the statement of claim by averring deceit, I would have felt bound to adjourn the hearing to give the defendant a fair opportunity of meeting the new charge, which involved fraud; and I would have felt bound to make the plaintiff pay the costs of the day. In the circumstances, perhaps the plaintiff's counsel did not think that the case warranted such expense.

On the facts and pleadings as they stood, the case resolved itself into the question of damages. It was contended for the plaintiff that she was entitled to general damages for breach of contract, although the statement of claim specifically asked for damages for delay only. There was, however, the claim for further or other relief which I was willing to treat as sufficient to cover any damages which the plaintiff on the case as presented by the pleadings allowed.

Assuming that the claim for general damages was open, the question arises whether on the law governing contracts for the sale of land the plaintiff is entitled to more than would cover the costs and expenses she incurred by entering into the agreement. In dealing with this question I must point out that this action remains, as it was commenced, a simple action for specific performance or damages for breach of an agreement. It is an action based on contract and on contract only, not on deceit or any other species of fraud. It was urged by counsel for the plaintiff that in the circumstances of the case she was entitled to general damages; but it was admitted that in order to establish such a claim it should be shown that the rule laid down in *Flureau* v. *Thornhill* (1) did not apply. Mr. Wilson in an able statement dealt very fully with this case and the subsequent decisions upon its true meaning and bearing. I must therefore go carefully over ground which has been often traversed by distinguished lawyers.

Under the general law of contract the party in default is liable to pay general damages for the breach; but in the year 1775 it was decided in *Flureau* v. *Thornhill* (1) that upon a contract for the sale of real estate, where a vendor without his default is unable to make a good title, the purchaser is not by law entitled to damages for the loss of his bargain. As has been more than once remarked, the report of the case is meagre. Indeed, so meagre is it, having regard to the importance of the decision, it justifies Dr. Johnson's remark that the English reports in general were very poor, only the half of what was said having been taken down, and of that half much was mistaken. As reported, the only reason given for the decision is that mentioned by Mr. Justice Blackburn, who said that contracts for the sale of lands are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. It was therefore held that the only damages which the purchaser who lost his bargain was entitled to recover were the costs which he incurred; but with all due respect to a decision which has become venerable by age, I cannot follow the

(1) 2 W. Bl. 1078.

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reasoning. If the contract was subject to the condition that the vendor's title was good, the condition of the contract was not fulfilled, and there was no breach carrying any damages whatever. I think that some better reason must be found, and it will be seen that it has been found. Unsatisfactory, however, as the decision may be, it is now too late to question it. It is settled law. So well settled is it that it has been described "as a part of the law of the land binding upon all Courts of Justice, and only to be altered, if at all, by legislation" (opinion of Mr. Justice Denman in *Bain* v. *Fothergill*) (1). But the real question is: Does the present case come within the rule? It has been urged that it is limited to cases in which the vendor, without his default, is unable to make good title, and that it does not apply where the vendor at the time when he was entering into the contract knew that he had no title, or having title or the means of making title, refuses to make title or wilfully disables himself from making it. I agree with Mr. Wilson that such cases do not come within the rule. This is clearly established by more than one case, and notably by *Day* v. *Singleton* (2), where the vendor's inability to make title to a leasehold which was subject to a condition against alienation without the consent of the lessor, was due to the fact that he contrived to get the lessor to refuse consent, in order that the vendor should get out of his bargain.

It is urged that the present case does not come within the rule, because a vendor who, knowing he has no title, enters into a contract for sale, is guilty of bad faith and of a breach of duty which every vendor owes to his purchaser. He in fact leads his purchaser into a trap, and practises a deceit upon him.

If such a case were open to the plaintiff on the statement of claim as it stands, and if it was proved, I would hold that the plaintiff was not bound by the rule in *Flureau* v. *Thornhill* (3). But in my opinion such a case is not open. In the first place, it involves a charge of fraud, or at least wilful default which amounts to fraud, and it is a settled rule of this Court that such a charge must be both alleged and proved. This is, in fact, one of the prescribed rules (Or. 19, r. 6.) In the second place, the fraud or wilful default does not arise out of the contract, but it is outside it and distinct from it. It is an independent cause of action, and the action must be based on it. I will illustrate this by the leading authority on the subject.

The rule in *Flureau* v. *Thornhill* (3) came under review in the year 1874 by the House of Lords in *Bain* v. *Fothergill* (1), and the decision of the House was given after taking the opinions of Mr. Baron Pollock, Mr. Justice Denman, and Mr. Baron Pigott. It is therefore a case of the highest authority. I need not go into its special facts, because the general propositions are clearly enunciated. Lord Chelmsford stated that the rule in *Flureau* v. *Thornhill* (3) is that upon a contract for the purchase of real estate, if the vendor without fraud is incapable of making a good title, the intended purchaser is not entitled to any compensation for the loss of his bargain. He considered that the rule was established beyond question, and later on he proceeds to show how a case of fraud should be dealt with. It should not be by an action for the breach of the contract, but by an

(1) L.R. 7 H.L. 176. (2) [1898] 2 Ch. 320. (3) 2 W. Bl. 1078.

action for deceit. He quotes (p. 206) from Sedgwick on Damages as follows:—"To this general rule [i.e., the rule in *Flureau* v. *Thornhill*] (1) there undoubtedly exists an important exception, which has been introduced from the civil law, in regard to damages recoverable against a vendor of real estate who fails to perform and complete the title. In these cases the line has been repeatedly drawn between parties acting in good faith and failing to perform because they could not make title and parties whose conduct is tainted with fraud and bad faith. In the former case the plaintiff can only recover whatever money has been paid by him, with interest and expenses. In the latter he is entitled to damages for the loss of his bargain. The exception cannot, I think, be justified or explained on principle, but it is well settled in practice." Lord Chelmsford's comment on this is:—"I quite agree that the distinction as to damages in cases of contracts for the sale of real estate where the vendor acts bona fide, and where his conduct is tainted with fraud or bad faith, is not to be 'justified or explained on principle.'" It is to be noted that this observation is confined to cases of contracts, and it is clear he did not intend that it should be applied to other cases, because he proceeds to quote this further passage from the judgment of Mr. Justice Blackburn in *Sikes* v. *Wild* (2):—"I do not see how the existence of misconduct can alter the rule by which damages for breach of a contract are to be assessed; it may render the contract voidable on the ground of fraud, or give a cause of action for deceit, but surely it cannot alter the effect of the contract itself." Lord Chelmsford then goes on to show that that opinion was adopted by Lord St. Leonards in the 13th and 14th editions of his Vendors and Purchasers, and he concludes by stating the law in his own words. Having stated that *Hopkins* v. *Grazebrook* (3), in which Abbott C.J. had remarked that he was not prepared to accept the rule in *Flureau* v. *Thornhill* (1) as establishing as a general proposition that where a vendor cannot make a good title the purchaser shall recover nothing more than nominal damages, he says that *Hopkins* v. *Grazebrook* (3) ought not any longer to be regarded as an authority, and gave his own opinion in the following words:—"I think the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for sale of a real estate knowing that he has no title to it nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit." Lord Hatherley entirely concurred in the judgment.

I am of opinion that *Bain* v. *Fothergill* (4) rules the present case as it has been presented; but I must deal with the case of *Day* v. *Singleton* (5), because Mr. Wilson submitted that the judgment of Lindley L.J. either explained away or so construed the judgment of Lord Chelmsford in *Bain* v. *Fothergill* (4) as to make it inapplicable to the matter in hand. It will be necessary to give an accurate account of the pro-

(1) 2 W. Bl. 1078.
(2) 1 B. & S. 587, at p. 594.
(3) 6 B. & C. 31.
(4) L. R. 7 H. L. 158.
(5) [1899] 2 Ch. 320.

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ceedings in *Day* v. *Singleton* (1). It was commenced as a purchaser's action for specific performance of an agreement for the sale of a leasehold interest, which was subject to a clause against assignment without the lessor's consent. The defence alleged that the lessors would not consent to the transfer. That defence if proved would have been a substantial defence to the action, because specific performance without the consent would have been impossible, and the plaintiff could only have recovered back his deposit and interest thereon and costs of investigating the title, as Lindley L.J. stated (see his judgment, p. 327). The plaintiff evidently recognized that, and accordingly he delivered an amended statement of claim, and therein alleged that the vendor, instead of doing his best to obtain the lessor's consent to the assignment to the plaintiff, and in breach of his duty towards him, endeavoured to induce, and did induce, the lessor to refuse to consent to an assignment to the plaintiff; that the defendant had since resold the premises for a larger sum than the price agreed to be paid by the plaintiff, and had by such fraudulent and improper conduct prevented the performance of the contract. The plaintiff abandoned his previous claim for specific performance, and instead thereof claimed damages for loss of profit, the expenses of investigating title, the return of the deposit and interest.

I have no doubt that this amended statement of claim was the result of a consideration of *Bain* v. *Fothergill* (2); and it is to be noted that the character of the action was completely changed. It was commenced as one for the specific performance of a contract, and based on contract. It was changed into one for fraud. In fact, the very thing was done which I suggested might have been done in the present case, and was not done. At the trial of the action of *Day* v. *Singleton* (1) Romer J. did not consider that the facts proved sustained the charge; that the vendor induced the lessor to withhold his consent. But the Court of Appeal held otherwise, and for this reason awarded damages to the plaintiff for loss of the benefit of the contract, in addition to the return of his deposit, interest thereon, and costs. It is manifest that the case was essentially different from *Bain* v. *Fothergill* (2), which was founded on contract. It was taken out of *Bain* v. *Fothergill* (2), in the very way suggested by Lord Chelmsford, by alleging a breach of duty, consisting of a fraud and deceit practised on the plaintiff, by contriving to get the lessor to withhold his consent, so that the defendant should be able to sell on more advantageous terms to another purchaser. It would not be correct to say that Lindley L.J. differed in any essential particular from Lord Chelmsford. It appears to me that he adopted the distinction drawn by Lord Chelmsford between an action on the contract and one founded on something outside it, viz., the breach of a vendor's general duty to a purchaser, which in *Day* v. *Singleton* (1) amounted to a fraud. On p. 328 he says: "But if Singleton could have got the lessor's consent, and would not—still more if the refusal of that consent was procured by Singleton—Day would have had a right of action for damages sustained against Singleton for a breach of his duty to obtain the lessor's consent." That was the cause of action alleged in the amended statement of claim. No doubt, Lindley L.J. makes an

(1) [1899] 2 Ch. 320. (2) L. R. 7 H. L. 158.

observation which is not in harmony with the principles laid down by Lord Chelmsford. On p. 329 he says: "If Dunn's representatives (the defendants) had tried to obtain the lessor's consent and had failed, Day (the plaintiff) could have obtained no more damages than those he has recovered (that is, what he was awarded in the Court below, a return of this deposit, interest, and expenses). The damage to him is occasioned by his not obtaining what he was entitled to by his contract; and, so far as damages are concerned, the reason why he fails to obtain what he bargained for is immaterial. The damage is the same whatever that reason may be." So far, this is quite in accord with Lord Chelmsford, and is in substance a repetition of what Blackburn J. said in *Sikes* v. *Wilde* (1). But, then, Lindley L.J. goes on to say—and this is what is relied upon by Mr. Wilson—"The only reason which can be assigned for deciding that he is entitled to more is that the rule which limits his damages in the first case is itself an anomalous rule based upon and justified by difficulties in showing a good title to real property in this country, but one which ought not to be extended to cases in which the reasons do not apply. This answer to the question with which we are dealing appears to us to be sufficient and satisfactory. The answer may possibly be difficult to reconcile with some of Lord Chelmsford's observations in *Bain* v. *Fothergill* (2), but the answer is, in our opinion, quite consistent with the decision in that case, and it has the merit of preventing the rule then held from leading to serious injustice."

On this passage I must have the hardihood to make the following criticism. I do not know what is meant by an anomalous rule of law. A rule is either good or bad. If it is good, as founded on some principles, it can't be called anomalous. If it is bad, it ought not to be followed. The rule in *Flureau* v. *Thornhill* (3) is as well established as any rule of law can be. It would only become anomalous if so interpreted as to make it applicable to cases which it was not designed to cover. It was only intended to rule transactions in which the vendor deals fairly with his purchaser. Lindley L.J. says it ought not to be extended to cases in which the reasons on which it is based do not apply. With all due respect, I am tempted to say that to speak of the extension of a rule is not an accurate expression, and must lead to inaccuracy of thought.

The question should always be: does the particular case come within the rule as it exists? *Day* v. *Singleton* (4) did not come within the rule, not because the rule ought not to be extended, but because as laid down it did not embrace it. I think that this gets rid of its supposed anomalous character, and points a way to reconciling the decision in *Day* v. *Singleton* (4) with *Bain* v. *Fothergill* (2). It is not, however, necessary for the purposes of the case I have on hand to go into refinements. Whether the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception, as stated by Lord Chelmsford, and general damages may only be recovered on a claim for deceit, or whether the rule is subject to exception, and that in the exceptional case an action for breach of contract carrying

(1) 1 B. & S. 587.
(2) L. R. 7 H. L. 158.
(3) 2 W. Bl. 1078.
(4) [1899] 2 Ch. 320.

M. R. 1922.

KELLY *v.* DUFFY.

general damages may be successfully maintained, in either case the exceptional element of deceit or wilful default must be alleged. It was not alleged here, and if I allowed that element to influence me, I would be offending against that fundamental rule of Court which makes it essential that fraud or wilful default must be alleged as well as proved. For these reasons I can only regard the case as a common one of specific performance or damages on the failure of the vendor to make title.

The judgment will be:—It appearing that the defendants are unable to make title to the premises agreed to be sold by Patrick Duignan, deceased, declare that the said agreement cannot be specifically performed, and that the plaintiff is entitled to recover from the defendants, as personal representatives of the said Patrick Duignan, her costs and expenses of and incident to the investigation of the title to said premises, and let said costs be referred for taxation; and order that the amount of said costs when certified be paid by the defendants to the plaintiff, and order the defendant to pay to the plaintiff the costs of this action.

Solicitors for the plaintiff: *C. J. Reddy & Son.*
Solicitors for the defendant: *O'Neill & Collins.*

R. R.

IN RE BRAITHWAITE'S SETTLED ESTATE.

(1922. No. 90.)

Ch. Div.
(N. I.)
Wilson J.
1922.
April 3.

Settled Land Acts, 1882-1890—*Sale by tenant for life—Land held under fee-farm grant—Power to sell by way of sub-fee-farm grant or long lease.*

A tenant for life selling in exercise of the powers conferred by the Settled Land Acts lands held under a fee-farm grant can sell in lots, carrying out the sales by making sub-fee-farm grants or long leases to the respective purchasers.

ORIGINATING SUMMONS.

William Braithwaite by his will, dated 26th March, 1884, devised four tenements, the subject of the present application, to trustees upon trusts under which, in the events which happened, the four daughters of the testator's wife were each entitled to one equal fourth share of the said tenements for her life, with a general power of appointment by her will over such share, with a gift-over in default of appointment to her next-of-kin. No power of sale or leasing was given to the trustees by the said will. Of the said four tenements, two were held under a fee-farm grant at the yearly rent of £20; the other two under fee-farm grants at the yearly rents of £28 and £19 19*s.* respectively. The property consisted of shops and houses let on yearly tenancies. The tenants for life were desirous of selling in order to obtain the advantages of the prevailing high prices of house property. It appeared from affidavits that such property could not be sold advantageously in large lots; that the most advantageous method of sale was to sell the shops and houses singly, and that the tenants had offered to buy the premises held by them respectively by taking sub-fee-farm grants, subject to certain rents and paying certain fines, and that it would be highly advantageous to all persons interested in the settled lands that sales to such tenants should be carried out on these terms. It was proposed that the rents to be reserved on the sales of the lots should be such as to amount to the rents reserved by the respective head fee-farm grants.

The summons was taken out by the tenants for life for an order appointing trustees of the settlement for the purposes of the Settled Land Acts, and for a declaration that the applicants were entitled (*a*) to exercise the powers of sale conferred upon tenants for life by the said Acts by selling all or any of the premises in lots; and (*b*) to carry out such sales by making to the purchasers of such lots sub-fee-farm grants or leases for terms of 10,000 years of the lots sold to them respectively at such fines and subject to such rents as might be agreed upon.

Ch. Div. (*N. I.*) *Wilson J.* 1922.

In re Braithwaite's Estate.

Megaw K.C., for the tenants for life :—

Trustees for sale of premises which are held under a fee-farm grant or lease may sell those premises in lots, and, even though not authorized by the trust instrument to grant leases, may carry out the sales of the several lots by making underleases thereof to the respective purchasers (*In re Judd and Poland and Skelcher's Contract* (1), *Alexander* v. *Clarke* (2)). The making of such underleases is a mere conveyancing expedient for conveniently carrying out the sales. The principles laid down in these cases apply to all fiduciary vendors, including tenants for life selling under the powers of sale conferred by the Settled Land Acts. The provisions as to a sale by a tenant for life contained in Settled Land Act, 1882, sect. 4, are almost identical with the provisions as to sales by trustees contained in the Trustee Act, 1893, sect. 13, upon the generality of which are based the judgments in *In re Judd and Poland and Skelcher's Contract* (1) and *Alexander* v. *Clarke* (2). It has been expressly decided in *In re Biggs-Atkinson and Ryan's Contract* (3), and in unreported cases in Ireland, that the principle of *In re Judd and Poland and Skelcher's Contract* (1) applies to the case of a tenant for life selling under the power of sale conferred by the Settled Land Acts.

His Lordship made the order applied for.

Solicitor for the applicant :—*J. Dunville Coates.*

M. G. E.

(1) [1906] 1 Ch. 684. (2) [1920] 1 I. R. 47. (3) [1913] 1 I. R. 125.

ESTATE OF H. W. JACKSON.

Land Judges. Wylie J. 1922.

March 24.

Landed Estates Court Conveyance—Mistake in operative clause—Conclusiveness.

By a Landed Estates Court conveyance certain lands were conveyed to A "to hold subject to the rent of £2 8*s.* 2*d.* reserved by lease of 1762." The rent reserved by the lease was in fact £2 18*s.* 2*d.*

Held, that the rent should be redeemed on the basis of £2 8*s.* 2*d.*, the rent as set forth in the habendum of the Landed Estates Court conveyance being binding on the Court.

Motion to redeem certain rents payable out of the Jackson estate, County Leitrim. Amongst other rents, there was payable a rent reserved by lease made on 28th April, 1762. The rent so reserved was £2 18*s.* 2*d.*, which had always been paid. By a Landed Estates Court conveyance, dated 6th July, 1863, the lands were conveyed to the vendor "to hold subject to the rent of £2 8*s.* 2*d.* reserved by the lease of 28th April, 1762." Subsequently, in 1909, the vendor pointed this out to the owner of the rent, whose agent agreed to accept the smaller sum as the accurate rent, and refunded six years' excess. The original counterparts of the lease of 1762 were not forthcoming; but a true copy was lodged in the Land Judges' Court, which showed the rent therein reserved, as also did the rental in the matter, to be £2 18*s.* 2*d.* Vendor now moved to redeem the smaller rent, while the owner of the rent sought to have redemption on the basis of the rent reserved by the lease.

Longfield, for the vendor:—

The rent paid since 1909 is £2 8*s.* 2*d.*, which is the rent in the habendum of the Landed Estates Court conveyance. That is the only rent that can be redeemed.

O'Donoghue, for the trustees of the settlement and Mrs. Peyton, the owner of the rent:—

The rent to be redeemed is the rent reserved in the lease of 1762. This is £2 18*s.* 2*d.*, as shown by the rental and the lease. The Court conveyance, which inserts a less sum, refers to the lease. There is no lease reserving a rent of £2 8*s.* 2*d.* In this instance the lease can be referred to in order to correct the inaccuracy: *De Vesci* v. *O'Kelly* (1); also *Re Murray* (2) and *Billing* v. *Welch* (3); Madden's Land Judges' Practice, p. 74. The lease is not excluded unless its terms are set forth in full.

Longfield, in reply:—

The dominant factor here is that the amount of the rent is mentioned in an operative clause.

(1) I. R. 2 C. L. 267; I. R. 4 C. L. 269.
(2) I. R. 6 Eq. 534.
(3) I. R. 6 C. L. 88.

Land Judges. Wylie J. 1922.

JACKSON'S ESTATE.

WYLIE J.:—

This case is somewhat novel in so far as it appears to disclose a mistake in a Court conveyance in the amount of the rent reserved by the lease subject to which the lands were conveyed. If the mistake occurred in the reference to the schedule or in a recital, then *De Vesci's Case* (1) would admit the original document to correct the error. The habendum, however, is conclusive, and the rent must be redeemed on the smaller basis. The Court of Appeal has held that a Court conveyance can affect interests of parties not before the Court by transferring their property.

Solicitors for vendor: *A. & J. Robinson.*
Solicitors for trustees and owner of rent: *A. O'Hagan & Son.*
Solicitor for Rev. H. Russell Joynt and Edward D. McLaughlin: *A. Lane-Joynt.*

H. H.

(1) I. R. 2 C. L. 267; I. R. 4 C. L. 269.

IN RE BROMHEAD'S TRUSTS. PUBLIC TRUSTEE, PLAINTIFF; BROMHEAD AND OTHERS, DEFENDANTS.

Powell J.
1922.
March 3.
April 6.

Settlement—Construction—"Issue"—Appointment—Contingency—Perpetuity.

By ante-nuptial settlement executed in 1823 freehold lands in the town of S. were settled upon trust, after the death of the survivor of the intended husband and wife, for the "issue of the said intended marriage" as the intended wife or husband should by will or deed appoint, with remainder in default of appointment to such issue in equal shares. An undivided share of leaseholds in the county of S. was also settled upon the same trusts as were limited in respect of the freeholds, or as near thereto as the different nature of the property admitted. The marriage was duly solemnized, and there were ten children born, nine of whom survived their parents. The wife survived her husband, and by her last will appointed all the settled leaseholds, and also all other hereditaments situate in the barony of C., in the county of S., over which she had power of appointment to trustees upon trust for a daughter for life, remainder to another daughter for life, remainder over to three other daughters in equal shares, or to the survivors or survivor of these three daughters living at the death of the surviving tenant for life.

At the date of this will all the settled freeholds, save one parcel, had been appointed by deed under the power created by the marriage settlement. The unappointed parcel was not situate in the barony of C.

In proceedings to determine the rights of claimants to funds representing the purchase-moneys of the settled leaseholds:

Held, 1, that on the construction of the marriage settlement the word "issue" meant "children" only, and that the power of appointment vested in the wife was a single non-exclusive power over both freeholds and leaseholds; 2, that the appointment purported to be made by the will was not bad as being an exclusive appointment of a non-exclusive power extending only to the settled leaseholds, but 3, was invalid as regards the ultimate remainder, which was void for remoteness; and 4, that in the events that had happened, the persons entitled to the funds were the children entitled under the settlement in default of appointment.

ORIGINATING SUMMONS.

Under an ante-nuptial settlement, dated 10th September, 1823, and executed in contemplation of the marriage between Edmund Gonville Bromhead (afterwards Sir Edmund Gonville Bromhead) and Judith Wood, the mother of the latter settled certain freeholds in the town of Sligo upon trust, after successive life estates to the intended husband and wife, for the "issue of the said intended marriage" in such shares, etc., as the said intended wife should by deed or will appoint, or as the intended husband should by deed or will appoint, with remainder in default of appointment equally share and share alike. The ultimate remainder in default of "issue of the said intended marriage" was limited to the settlor absolutely. An undivided fourth share in leasehold property in the county of Sligo to which the intended wife was absolutely entitled was also settled upon the same trusts as those limited in respect of the freeholds, or as near thereto as the different nature of the property admitted. The marriage was duly solemnized, and there were ten children, nine of whom survived their parents. Lady Bromhead survived her husband, and died on the 12th July, 1873, having by instructions for a will (proved as her last will), dated the 29th May, 1873, provided as follows:—

"In exercise of all powers vested in me, I appoint, give, and devise my one-fourth share of and in the estate known as (setting out the lands), and all other the hereditaments and premises situate in

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the barony of Corran, County Sligo, over which I have any power of appointment or disposition under and by virtue of my marriage settlement or otherwise, unto my son Gonville Bromhead and Edward Day upon trust to permit my daughter Alice Margaret to receive the rents and profits for life, and after her death to pay such rents and profits unto or permit the same to be received by my daughter, Helen Morrison, for her life; and after the death of the survivor of them I direct my said trustees to sell my share, estate, and interest in the said property either by public auction or private contract at their discretion, and to convey the same to the purchaser thereof, freed and discharged from all trusts and provisions of this my will, and to divide the balance of such proceeds as shall remain in their hands after payment of the expenses incurred in and about the conduct of the trusts between my three daughters—Mrs. Riddell, Mrs. Pocklington, and Mrs. Diamond—in equal shares, or to the survivor or survivors of them who may be then living."

Prior to her will and death, Lady Bromhead by deed, in exercise of her power of appointment, had appointed all the settled freeholds, except one house and premises which were not situate in the barony of Corran. Helen Morrison Bromhead died on the 29th December, 1906; Mrs. Janetta Colville Riddell on the 28th September, 1892, and Victoria Colville Diamond on the 8th June, 1909; Alice Margaret Bromhead died on the 4th November, 1920. The undivided fourth share of the settled leasehold lands was sold under the Land Purchase Acts, the vendor being Alice Margaret Bromhead; and by an order of the Land Judge, dated the 22nd October, 1914, the Public Trustee was appointed a trustee of the purchase-moneys under the compound settlement created by the marriage settlement of 1823 and Mrs. Bromhead's will for the purpose of the Settled Land Acts. On the 11th June, 1921, on a summons on the construction of the above compound settlement, Sir Benjamin Parnell Bromhead, a son of Lady Bromhead, was appointed to represent the children of the marriage between Sir Edmond Gonville Bromhead and Lady Bromhead, Mrs. Mary Fleury Bottomley, grandchild of Lady Bromhead, being appointed to represent the remoter issue of the marriage. Mrs. Elizabeth Pocklington, a daughter of the marriage, and the survivor of the three daughters to whom the ultimate remainder under Lady Bromhead's will was limited, claimed the whole of the funds as representing the purchase-moneys of the settled leaseholds.

Mrs. Pocklington died on the 10th October, 1921, her will being proved on the 16th November, 1921, by her executor, Richard Woollcombe. By order to proceed, dated the 19th December, 1921, Richard Woollcombe was added as a defendant; Mrs. Hogarth, a granddaughter of Lady Bromhead, was appointed to represent the remoter issue of the marriage instead of Mrs. Bottomley, the latter being appointed to represent the interest of Alice Margaret Bromhead, and certain questions, other than those stated by the original summons, were added.

The questions as finally framed were as follows:—

1. Whether upon the true construction of the compound settlement and in the events that had happened, the direction in the will

contained to divide the proceeds of the sale of the settled lands between testatrix's three daughters—Mrs. Riddell, Mrs. Pocklington, and Mrs. Diamond—in equal shares, or to the survivors or survivor of them living at the death of the survivor of testatrix's two daughters—Alice Margaret Bromhead and Helen Morrison Bromhead—is void for remoteness or otherwise?

2. Whether in the gift in said indenture contained of the settled lands in default of appointment, the word "issue" means "children" only, and if not whether such issue take per capita?

3. Whether the word "issue" mentioned in the preceding question is confined to issue living at the death of the survivor of Sir Edmund Gonville Bromhead and Dame Cristine Bromhead?

3A. Whether the power of appointment of the lands in the barony of Corran, Co. Sligo (chattels real), was separate and distinct from that over the other lands settled by the settlement of 1823, or did they jointly form one power?

3B. Was the appointment in Lady Bromhead's will effective in the events which have happened to give Mrs. Pocklington an absolute interest in the property, subject to the appointment?

3C. Was the appointment in the said will effective to give Alice Bromhead a life estate in the property, subject to the said power of appointment?

3D. If the appointment of a life estate to Alice Margaret Bromhead was invalid, what estate had she at the date of her death in the said property, and, if none, in whom did the said property become then vested, and for what estate and interest?

Ryland, for Mrs. Bottomley:—

The appointment of the life estate on the whole settled property was bad: *Lloyd* v. *Laver* (1). When Alice Bromhead entered into possession she remained in possession until her death, and obtained a statutory title.

Longfield, for Richard Woollcombe:—

The settlement when properly read contains a single power of appointment over all the settled property, not two separate powers, one in relation to the settled leaseholds and the other in relation to the settled freeholds. The two classes of property are settled so far as is possible on identical trusts. If there is a single power, the appointment purported to be made by the will is good. Alice Bromhead as tenant for life instituted the proceedings in the land purchase matter, and her executors cannot claim a larger estate than she claimed for herself. The life estate appointed by the will was perfectly good; the provision after the death of the survivor of the two life tenants was an attempt to create a shifting clause. This latter provision can be ignored as invalid, being in excess of the power; but there is no difficulty in separating the valid portion of the appointment from the invalid. In this country the word "issue" in a marriage settlement is generally construed as meaning "children" only: *Harris* v. *Loftus* (2).

(1) 14 Times R. 645.

(2) [1899] 1 I. R. 491.

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1922.

In re BROMHEAD'S TRUSTS.

Cole Bowen, for remote issue:—

I adopt Mr. Longfield's argument as to the construction of the settlement in relation to the property comprised in the power. The appointment made by the will in favour of the "survivor" of the married daughters is, however, bad, as it infringes the rule against perpetuities: *Whitby* v. *von Leudecke* (1); *Manning's Trusts* (2). It is impossible to cut down the meaning of "issue" to "children." The settlement was made in 1823, and is not in accordance with modern forms of settlement. There is no provision by way of succession or substitution between one class of issue and another. The gift over on failure of issue need not necessarily be construed with the gift in default of appointment; but where the same expression is used in the same context it should be given the same effect The English authorities are against *Dixon's Trust* (3); *Warren's Trusts* (4).

E. Leet, for the children:—

The word "issue" is dealt with in Stroud's Judicial Dictionary, vol. ii, p. 103. The rule in Ireland is to confine the meaning of "issue" in marriage settlements to children: *Dixon's Trusts* (5); Norton on Deeds.

Cur. adv. vult.

POWELL J., having stated the facts, continued:—

It appears from the affidavit of the plaintiff, filed on the 11th of June, 1921, that Helen Morrison Bromhead died on the 29th December, 1906, that Mrs. Riddell died on the 29th September, 1892, and that Mrs. Diamond died on the 8th June, 1909, and that Alice Margaret Bromhead died on the 4th November, 1920; and from the affidavit of the plaintiff filed on the 5th December, 1921, it appears that since the making of his previous affidavit the defendant Elizabeth Frances Pocklington died, and that probate of her will had been granted to Richard Woollcombe.

The first question for determination is: "Whether upon the true construction of the compound settlement, consisting of the settlement and the will, and in the events which have happened, the direction in the said will contained to divide the proceeds of the sale of the settled lands between the testatrix's three daughters, Mrs. Riddell, Mrs Pocklington, and Mrs. Diamond, in equal shares, or the survivor or survivors of them who might be living on the death of the testatrix's two daughters, Alice Margaret Bromhead and Helen Morrison Bromhead, is void for remoteness or otherwise?"

I am of opinion that this direction is void. I think that Mr. Cole Bowen's argument on this point is well founded, that the estates for life in the appointment are good, but that the remainders are bad and void for remoteness. In reading and considering the whole appointment, having regard to the words used, I think that the succession was made to depend on the contingency, and therefore I think that I

(1) [1906] 1 Ch. 783, at p. 787.
(2) 49 I. L. T. R. 143.
(3) I. R. 4 Eq. 1.
(4) 26 Ch. D. 208.
(5) I. R. 4 Eq. 1.

cannot strike out the words which make it void. I think the decision of Mr. Justice Buckley in *Whitby* v. *von Leudecke* (1), cited by Mr. Cole Bowen, is in point, as, indeed, are many other authorities cited by him.

The next question is whether in the gift in the said indenture contained of the settled lands in default of appointment the word "issue" means children only, and, if not, whether such issue take per capita? I am of opinion that the word "issue" here means children. I do not think it is seriously contended that if I am bound by the statement of the principle of construction laid down by Lord Justice Christian in *In re Dixon's Trusts* (2) there can be any doubt that I should so hold.

Lord Justice Christian there points out that the proper objects of the marriage settlement are the children of the intended marriage; grandchildren and greatgrandchildren are never thought of on such occasions as objects of intending provision; portions are provided for the children, and they are enabled thereby, when their own turn comes to be married, to make provision for their children. But issue more remote than children are rarely, if ever, directly within the scope of a marriage treaty; and therefore it is that when dealing with such an instrument the very occasion suggests that if "issue" be the word used, it is meant in the sense to which it so easily lends itself, of children. "Thus, the very nature of the instrument helps to construe the word. Another clue is this—the constant association with 'issue' of the words 'of the marriage' or 'of him.' Thus, in the recitals, it is 'to make a provision for the said Anne and the present and future issue of the said Anne, by him the said Thomas William'; and, again, 'in order to make provision for the said Anne and the issue of said marriage'; and in the limitations themselves the same form of expression is twice repeated, 'to and amongst the present and future issue of the said marriage.' Now, what is the force of those associated words? Plainly, to my mind, they particularize the sense of the word 'issue' to the immediate offspring of that particular marriage; the issue of the union of these two individuals, and not the issue of any other union. In other words, the children of these two. It is an effect of precisely the same kind which in *Sibley* v. *Perry* (3) and other cases was attributed to the word 'parent.' 'Parent' appended to 'issue' has been held to give to the word, otherwise indefinite, the sense of immediate offspring. To my mind, such words as 'of the marriage' or 'by him the said intended husband' or such like occurring in a marriage settlement possess still more strongly the same significancy."

Though at the present time it would not be accurate to say that issue more remote than children are rarely if ever directly within the scope of a marriage treaty, yet at the time that this marriage settlement was prepared it was the practice of conveyancers not to provide for issue more remote than children.

It is stated in Davidson's Conveyancing Settlements, vol. iii, part 1, that extension of the power of appointment not only to children, but to remoter issue of the marriage, is now generally adopted, because it enables the donor of the power to provide by appointment for the

(1) [1906] 1 Ch. 783. (2) I. R. 4 Eq., at p. 12. (3) 17 Vesey, 522.

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In re BROMHEAD'S TRUSTS.

family of a deceased child or of a child who, through improvidence or misfortune, is incapable of taking the benefit of a direct trust. For this reason the frame of the trust has mostly superseded that formerly in use, in which the power of appointment was given in favour of the children of the marriage only.

Mr. Leet has pointed out words and phrases in this marriage settlement similar to those relied upon by Lord Justice Christian in the settlement before him. Mr. Cole Bowen has asked me not to follow Lord Justice Christian's statement of the principle of construction of the settlement in this respect, and he referred to the disapprobation of *Sibley* v. *Perry* (1) in the judgment of Brett L.J. in *Ralph* v. *Carrick* (2). As regards the canon of construction laid down by Lord Justice Christian in *In re Dixon's Trusts* (3), to which I have referred, it has been followed and approved of in Ireland by Sir Edward Sullivan in *Donoghue* v. *Brookes* (4) and in *In re Denis's Trusts* (5), and by the Vice-Chancellor in *Harris* v. *Loftus* (6). Referring to Lord Justice Brett's criticism in *Ralph* v. *Carrick* (2), Lord Justice Cozens-Hardy, in his judgment in *Smiles* v. *Timson* (7), says:—"It is quite true that Brett L.J. in *Ralph and Carrick* (2) said he should be happy to attend the funeral of *Sibley* v. *Perry* (1)"; but he adds, "I am not one of those who would like to follow that funeral." I think it is a good rule, although, like all other rules of the kind, its application may be cut down by the context of the will. I do not feel at liberty to differ from Lord Justice Christian in *Dixon's Trusts* (3), and Mr. Cole Bowen very fairly admits that that case is against him.

The next question is as follows:—Was the power of appointment of the lands in the barony of Corran, Co. Sligo ("chattels real"), separate and distinct from that over the other lands settled by the settlement of 1823, or did they jointly form one power?

This is a matter on the construction of the settlement, and although I agree with Mr. Leet that the settlement is badly drawn, I have come to the conclusion that Mr. Longfield's very clear analysis of the settlement supports his contention, and that the construction he puts forward is well founded, and that I should answer the question by saying that the power of appointment of the lands in question in the Co. Sligo, chattels real, was not separate and distinct from that over the other lands settled by the settlement of 1823.

This being so, there is no necessity to answer questions 3b, 3c, 3d, which raised extremely nice points of law, which were argued with great clearness and ability by Mr. Ryland.

Solicitors for all parties: *Sir William Fry & Sons.*

C. N. K.

(1) 17 Vesey, 522.
(2) 11 Ch. D. 873, at p. 884.
(3) I. R. 4 Eq. 1.
(4) I. R. 9 Eq. 489.
(5) I. R. 10 Eq. 81.
(6) [1899] 1 I. R. 491.
(7) [1916] 2 Ch. 363, at p. 365.

IN RE MORRIS, DECEASED. CONEYS, PLAINTIFF, *v.* MORRIS, DEFENDANT (1).

(1922. No. 9.)

Ch. Div.
(S. I.)
Powell J.
1922.
March 3, 31.
Appeal.
June 14.

Banker and customer—Set-off—Statute-barred debt—Principal and surety—Payment by surety.

M., the principal on a promissory note to the N. Bank, died before the note became payable, and the note was not paid at maturity. After more than six years had elapsed (no payment or acknowledgment having been made) the bank set off the amount of the note against moneys due by them to the plaintiff, one of the sureties on the note. The plaintiff then claimed as a creditor of M. to administer his estate in respect of this indebtedness.

Held, by the Court of Appeal in Southern Ireland, affirming the judgment of Powell J., that the plaintiff was not a creditor of M. in respect of the moneys which the bank had applied in discharge of the note, inasmuch as at the date of this set-off the remedy of the bank against the deceased was statute-barred.

ORIGINATING SUMMONS.

The material facts and dates are as follows :—

On the 6th February, 1914, Timothy Aloysius Morris and the plaintiff signed a promissory note to the National Bank for £100, payable six months after date, the plaintiff signing as surety. On the 22nd May, 1914, the bank credited against the note the sum of £26 1*s.* 5*d.*, leaving then due the balance of £91 18*s.* 7*d.* for principal and interest. The plaintiff alleged that this payment was made on the 22nd May, 1917, and not on the 22nd May, 1914. It was admitted that this payment had been made by the bank to themselves by the transfer of £26 1*s.* 5*d.* standing to the credit of the principal debtor. Timothy Aloysius Morris died on the 3rd July, 1914, having made his will on the 31st January, 1912, whereby he appointed his son, the defendant, Anthony James Hellier Morris, and Thomas William Higgins executors and trustees. On the 3rd June, 1921, the plaintiff paid to the bank the balance due on the note. In his affidavit he stated :—"The balance not having been paid, the bank called upon me to pay the same ; and on the 3rd June, 1921, I paid the bank the sum of £108 8*s.* 7*d.* in full discharge of the principal and interest due to said date." The plaintiff brought an action in the King's Bench Division against the defendant for the recovery of the sum so paid. The defendant claimed to have fully administered the personal estate of deceased ; and on a motion for final judgment the order made was "No rule ; costs, costs in the action."

The plaintiff subsequently issued the present summons as a creditor of deceased on behalf of himself and all other creditors for administration of the real and personal estate of deceased.

(1) Before POWELL J.

Ch. Div.
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Leonard K.C. and *Carson*, for the plaintiff:—

The statute began to run on the 3rd June, 1921, when the plaintiff paid the bank. The surety was entitled to call upon the principal to pay the debt at any moment; and the plaintiff as surety could also pay it off himself. The statute has not extinguished the debt; it merely bars a particular remedy. An executor may pay a statute-barred debt owed by his testator. Where a surety sues a principal the form of action may be for recovery of money paid at request; but it need not be so; the surety may not be compellable to pay, but it is submitted that if he does pay when not so compellable he is entitled to relief: *Gardner* v. *Brooks* (1); *Ascherson* v. *Tredegar Dry Dock and Wharfage Co.* (2); *Hughes-Hallett* v. *Indian Mammoth Gold Mine Co.* (3); *Nisbet* v. *Smith* (4); *Dale and Perry* v. *Lolley* (5); *Clarke* v. *Stamford* (6).

Charles Murphy, for defendant:—

The right of the surety against the principal is a right of indemnity. The statute runs against the surety from the date when the surety might have taken his action for indemnity: De Collyar, 3rd ed., p. 311.

Leonard, in reply.

Cur. adv. vult.

POWELL J., having stated the facts, continued:—

Mr. Murphy, for the defendant, opposes the order for administration on the ground that at the date upon which the plaintiff paid this sum of £108 8*s.* 7*d.*, namely, 3rd June, 1921, the debt was barred by the Statute of Limitations. There is no dispute about this; and the question is whether in these circumstances I should make an order for administration at the instance of the plaintiff.

Mr. Leonard, counsel for the plaintiff, states that an action was brought by the plaintiff in the King's Bench Division against the defendant for recovery of the sum so paid by him to the bank; and I understand that a final judgment motion was instituted upon which the order was "No rule; costs to be costs in the action." This action apparently is still in abeyance; but Mr. Leonard states that, having regard to the defendant's plea of plene administravit, he came to the conclusion that it would be more advisable to bring the present proceedings in the Chancery Division. Of course, if the plaintiff had proceeded with the action in the King's Bench Division, and had obtained a verdict and judgment in the action, I should have held that he had established his rights, and there would then be a debt which would entitle the plaintiff to an order for administration here as a creditor. As it is, I think the first but not the only matter which I must decide is whether the plaintiff could in law sustain an action against the defendant in respect of the payment by him of the sum in question, notwithstanding that the Statute of Limitations had barred the

(1) [1897] 2 I. R. 6.
(2) [1909] 2 Ch. 401.
(3) 22 Ch. D. 561.
(4) 2 Bro. Ch. C. 579.
(5) 2 Bro. Ch. C. 582.
(6) 2 Bro. Ch. C. 583.

remedy of the bank, both as against the executor of the deceased and himself, the surety. Can a surety who has paid a creditor the amount of a statute-barred debt recover that amount on the Common Law side of the Court from the principal debtor? Counsel on both sides agree that there is no authority on the point. Possibly this is due to the fact that payment of statute-barred debts, either by principals or sureties, is of rare occurrence.

There is no doubt that where a surety is compelled to pay the debt of a principal debtor, he may recover it as money paid for the use of the debtor. The form of pleading in such an action is, for money paid by the plaintiff for the defendant at his request, but it is not necessary that there should be an actual request; the request in such a case is implied, and the promise to pay is implied, but the question arises: can a surety who voluntarily pays a debt for a principal which is not recoverable either against the principal or himself successfully allege the implied request, or the implied promise to pay? No doubt it is the remedy only which is barred; the debt is not extinguished; but if the remedy is barred, does the implied request and promise still remain?

In *Pownal* v. *Ferrand* (1), where the indorser of a bill, being sued by the holder, paid him part of the sum mentioned in the bill, it was held that he might recover the same from the acceptor in an action for money paid to his use. Lord Tenterden says, at p. 443:—"I am of opinion that he [the plaintiff] is entitled to recover upon the general principle that one man who is compelled to pay money which another is bound by law to pay is entitled to be reimbursed by the latter, and I think that money paid under such circumstances may be considered as money paid to the use of the person who is so bound to pay it." Bayley J. says, at p. 443:—"The law is that a party by voluntarily paying the debt of another does not acquire any right of action against that other; but if I pay your debt because I am forced to do so, then I may recover the same, for the law raises a promise on the part of the person whose debt I pay to reimburse me." In *Sleigh* v. *Sleigh* (2) the plaintiff drew and indorsed a bill of exchange for the accommodation of the defendant, the acceptor, which was dishonoured when due, and he subsequently paid the holder a sum of money in discharge of his liability, without having had notice of dishonour and without any express request from the acceptor. It was held that he could not recover the amount from the acceptor as money paid to his use. The acceptor had not requested the plaintiff to waive the want of notice by the holder, and pay the bill or any part of it. That is to say, the plaintiff might have but did not avail himself of a legal defence as against the claim of the holder. Here the plaintiff did not avail himself of a legal defence, namely, the Statute of Limitations, which he had as against the bank." Parke B. says, p. 345:—"It must be taken for the purposes of this suit that the plaintiff paid the money without being compellable by law to do so. Now, to make a person liable in this form of action for money paid to the defendant's use, the plaintiff must not only show that the money paid, pro tanto, discharged the liability of the defendant to the holder of the bill, but also that it was paid

(1) 6 B. & C. 439.

(2) 19 L. J. N. S. Ex. 345.

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at the request, express or implied, of the defendant. Here the money paid clearly discharged pro tanto the liability of the defendant as acceptor to the holder, and it is also clear that there was no express request from the defendant to the plaintiff to pay the money. It remains to be seen, therefore, whether there was from the circumstances an implied request for him to do so. Now there is no doubt, he says, if a person lends his name to another for his accommodation, the party accommodated undertakes to pay the bill at maturity . . . and further to indemnify the person accommodating him in case he is compelled to pay the bill for him. There is an implied authority, no doubt, to such a person if he be in that situation that he may be compelled by law to pay the bill, without its being necessary for the holder actually to compel him to do so, and if so he may sue the party for money paid to his use, for such payment is in truth under the implied authority given by the contract of accommodation between the parties; and whether this be a payment of the whole bill or only part of it makes no difference. But the defendant, as the person accommodated, has not, we think, undertaken to indemnify the plaintiff against the consequences of any payment which the plaintiff may voluntarily make with a knowledge of the circumstances. Whether this would be the case where the legal obligation has been discharged by circumstances unknown to him, as, for instance, by the creditor having given time to the principal debtor without his knowledge, it is unnecessary to determine; but when a payment is made, as in this case, with the knowledge on the part of the plaintiff that he was not bound to pay for want of notice of dishonour to which he was unquestionably entitled, we think the payment was not made with the implied authority of the defendant."

In the present case it is not suggested that the plaintiff did not know that the Statute of Limitations was available to him as a defence, and that, therefore, he was not bound to pay the bank.

In *Moule* v. *Garrett* (1) Chief Justice Cockburn adopts the statement in Mr. Leake's work on Contracts. Where the plaintiff has been compelled by law to pay, or being compellable by law has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability, in such circumstances the defendant is held indebted to the plaintiff in the amount.

In the present case the plaintiff was not compelled by law to pay the amount which he paid. He has not paid it, being compellable by law to pay it, nor is it money which the defendant was ultimately liable to pay, nor was there any liability on the deceased to pay it. Payment by a surety of sums of money for which a principal is liable, giving a right of action against the principal for money paid to his use, is called by Baron Parke in *Davies* v. *Humphreys* (2) "money paid in ease of the principal." I do not see how it can be said that money paid to a creditor on foot of a debt that is statute-barred as against the principal can be said to be in ease of the principal. I am of opinion that the plaintiff could not recover this debt in a common law action.

(1) L. R. 7 Ex., at p. 104. (2) 6 M. & W. 153.

Mr. Leonard has referred to *Gardner* v. *Brooke and Others* (1), but in my opinion the decision in that case does not affect the question which I have to determine in this case. That was an action by the executors of one of three makers of a promissory note, whom the jury found were principals, and who had made payments to the payees, the bank, which prevented the Statute of Limitations running as between them and the bank, and who had subsequently paid a sum which was accepted by the bank in full discharge. It was brought against one of the three makers who had paid nothing and given no acknowledgment to recover contribution towards this last payment by the plaintiffs. The defendant relied on the fact that the Statute of Limitations had barred the claim of the bank as against him; but the Court held in regard to the right to contribution between co-debtors that the Statute of Limitations only commenced to run from the date on which one of them was damnified by being compelled to pay more than his share of the common debt. The decision of Mr. Justice Wright in *Wolmershausen* v. *Gullick* (2) was approved and followed. That case decides that the Statute of Limitations does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is ascertained—that is, until the claim of the principal creditor has been established against him, although at the time of the action for contribution the statute may have run as between the principal creditor and the co-surety. But even in proceedings by a surety claiming contribution from a co-surety, the right only arises when the surety is liable to pay or has paid either the whole or more than a just proportion of the debt for which he is liable to the principal creditor, or where judgment has been had against him for the amount of the debt, or where the claim of the principal creditor against a deceased surety has been allowed. See White and Tudor, Leading Cases in Equity, 8th ed., p. 549, where several authorities, including *Gardner* v. *Brooke* (1) and *Wolmershausen* v. *Gullick* (2), are referred to. But Mr. Leonard also contends that the plaintiff would be entitled to relief in a Court of Equity against the principal debtor, and consequently against his legal personal representative.

In *Woolridge* v. *Norris* (3) a surety on a bond to secure a money debt was secured by another bond of indemnity entered into by the principal debtor's father, who had died, having by will devised certain property specifically upon trust to pay the debt. The creditor having applied to the surety, the surety had recourse to the executors, who said they had no funds in hands, and that they were unable under the will to raise the money by sale of any portion of the testator's estate except under a decree of the Court. It was held that the surety, though he had not actually paid anything, was entitled to maintain a bill against the executors for administration, payment of the "debt," and indemnity, and that it was not necessary that the bill should be filed on behalf of all the creditors. The facts of the case are fully set out in the report. It is not necessary for me to state them here. Several cases were cited by counsel for the plaintiff establishing the principle that at any time after the debt becomes due, though the surety be not sued, yet he has a right to call upon the principal to discharge the debt, it being unreasonable that a man should always

(1) [1897] 2 I. R. 6. (2) [1893] 2 Ch. 514. (3) L. R. 6 Eq. 410.

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have such a cloud hanging over him. Sir George Giffard, Vice-Chancellor, in *Woolridge* v. *Norris* (1), described the bill as being in the nature of a bill quia timet; and he quoted a passage from Lord Redesdale as follows:—"A Court of Equity will also prevent injury in some cases by interposing before any actual injury has been suffered. by a bill, which has been sometimes called a bill quia timet, in analogy to proceedings at the Common Law, where in some cases a writ may be maintained before any molestation, distress, or impleading. Thus a surety may file a bill to compel a debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not, and upon a covenant to save harmless a bill may be filed to relieve the covenantee under similar circumstances." Sir George Giffard continues:—"In this case the bond was an actual bond for indemnity, and the person to be indemnified was a surety on another bond. No doubt a bond of indemnity can be framed in such a way as to preclude the surety indemnified thereby from filing a bill until he has actually paid something on behalf of his principal." The learned Judge then considered the terms of the bond, and continued (p. 414):—"The meaning of that paragraph is clearly this, that the plaintiff has been called upon to pay within the terms of the latter clause of the above instrument. I think, therefore, that the exact state of circumstances has arisen which was contemplated by the framers of this bond to entitle the plaintiff to file this bill." But in that case the obligation under the bond was a continuing obligation, and no defence under the Statute of Limitations was available. The plaintiff could have been compelled to pay.

There are numerous authorities to the like effect. But the difficulty that I feel in applying the principles laid down in these authorities to the present case is that they seem in each case to depend upon the fact that there was a liability upon the person indemnified in regard to the subject-matter of the indemnity. No doubt while the position in the present case was that the bank could have recovered the amount of this promissory note against the deceased or the surety, or both, the plaintiff had a right to be indemnified; and while such liability remained he had a right, apparently, to come to this Court to have the indemnity made good. But does that right exist when the remedy to enforce the liability is barred by the Statute of Limitations?

Mr. Leonard has referred to the case of *Ascherson* v. *Tredegar Dry Dock and Wharfage Co., Ltd.* (2), in which Swinfen-Eady J. deals very fully with this class of equitable relief. The headnote is: "Where there is an actual accrued debt secured by a guarantee and one of several co-sureties is liable and admits liability for the amount guaranteed, he has a right in equity to compel the principal debtor to relieve him from his liability by paying off the debt."

Reference was made during the argument to the case of *Hughes-Hallet* v. *The Indian Mammoth Gold Mines Co.* (3), in which case, there being no present liability, but merely a possibility of a future call on shares, the Court refused the relief claimed.

(1) L. R. 6 Eq. 410, at p. 413. (2) [1909] 2 Ch. 401. (3) 22 Ch. D. 561.

Reference was also made to the case of *Nisbet* v. *Smith* (1), in which Lord Thurlow, at p. 382, had said: "It is clear, and never has been disputed, that a surety, generally speaking, may come into this Court and apply for the purpose of compelling a principal debtor for whom he is surety to pay in the money and deliver him from the obligation." Reference was also made to the case of *Dale & Perry* v. *Lolley* (2), in which it was decided by the whole body of Judges in the Exchequer that a bill will not lie upon any general equity by a surety against a principal debtor to have an indemnity or to have the money paid into Court where no further time has been given, where the date of payment has not elapsed, and the surety has not been damnified or is not in any imminent danger of being so, or unless a distinct agreement can be proved that it should be done whenever the plaintiff called on him for it. Swinfen-Eady J. in the case under review, having pointed out that the bank, the creditor, had a present right against the executors, said that it had been the law of the Court for very many years that a surety is entitled to come into a Court of Equity to compel the principal debtor to pay what is due from him, to the intent that the surety may be relieved. He dealt exhaustively with the authorities, including the Irish case of *Mathews* v. *Saurin* (3), in which case the Master of the Rolls, he says, determined that, when there is an actual accrued debt, and the surety is liable and admits liability for the amount guaranteed, he has a right to compel the principal debtor to relieve him from his liability by paying off the debt. He also referred to the decisions in *Dale & Perry* v. *Lolley* (2) and *Hughes-Hallet* v. *The Indian Mammoth Gold Mines Co.* (4), and said that the action before him was not like these cases, in the first of which a surety had brought an action to compel the debtor to pay a bill not due for twenty months, and in the second case the plaintiff had asked for an indemnity against a future contingent liability. He said, at p. 409, "The obligation of the executors is a present liability, and they are entitled to the relief they ask," and he made a declaration that the plaintiffs as executors of the deceased were entitled to be discharged and exonerated from all liability under the guarantee by payment by the defendant company to the bank of the money in question, or so much thereof as was then owing by the defendant company to the bank, and an order for the defendant company to pay the amount to the bank so as to satisfy the plaintiff's liability, with liberty to apply in the event of non-payment. The whole of that judgment is based upon the fact that the obligation of the executors was a present liability. I do not think I can extend the equitable doctrine to be found in these cases to a case in which the remedy of the creditor was barred by the Statute of Limitations at the time the money was paid by the surety.

Although Mr. Leonard put forward every available point with great clearness and force, he did not, I think, attempt to contend that his client paid this money to the bank by reason of any legal liability to pay, or under any impression that he was legally liable to pay it. I can quite appreciate the reasons which induced the plaintiff to pay the money to the bank rather than rely on the legal defence of the Statute of Limitations; he may have felt morally bound to pay it.

(1) 2 Bro. Ch. C. 579.
(2) 2 Bro. Ch. C. 582.
(3) 31 L. R. Ir. 81.
(4) 22 Ch. D. 561.

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And it may be that if the executors had authorized him to pay it, or consented to his paying it, then, as they might have paid it themselves if they were so minded, notwithstanding that it was barred by the Statute of Limitations, there might be evidence sufficient to support a promise to pay the plaintiff the amount so paid by him, because the doctrine of moral obligation as a ground for a promise has been applied to cases where the law would have given a clear right of action originally if some legal impediment had not suspended or precluded the liability of the party, such as infancy, bankruptcy, or the Statute of Limitations (see note to *Wennall* v. *Adney* (1)).

In *Eastwood* v. *Kenyon* (2) Lord Denman, referring to cases in which the declaration disclosed a sufficient moral obligation to support a promise, says (at p. 447) :—" Most of the older cases on this subject are collected in a learned note to the case of *Wennall* v. *Adney* (1), and the conclusion there arrived at seems to be correct in general, 'that an express promise can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no cause of action if the obligation on which it is founded never could have been enforced at law though not barred by any legal maxim or statute provision.'"

But there is no evidence whatever in the present case that the executors authorized or assented to the payment by the plaintiff here of the statute-barred debt.

Mr. Murphy has further contended that, in any event, the plaintiff's claim for relief is barred by the Statute of Limitations on the ground that time began to run against the plaintiff from the earliest time at which the plaintiff could have brought an action or obtained relief, which time in the present case would be from the 9th August, 1914, the date upon which the promissory note became payable. *Hemp* v. *Garland* (3) and *Reeves* v. *Butcher* (4) seem to support this contention; but, having regard to the view which I take on the main questions, it is not necessary for me to decide this point.

For the reasons I have stated, I am of opinion that the plaintiff is not entitled to an order for administration, and I must therefore dismiss the order sought with costs.

C. N. K.

June 14.

The plaintiff appealed to the Court of Appeal in Southern Ireland (5), and obtained leave to file a further affidavit, in which he stated that he had been a customer of the National Bank in Clifden for upwards of fifty years, during which period he had had a current account, generally on credit, and deposit accounts of varying amounts. On several occasions, after the death of Mr. J. T. A. Morris, he stated the manager in Clifden spoke to him about the promissory note which he had signed as surety for the deceased, and told him that, failing some arrangement by the persons in possession of the property of the deceased, the bank would look to him for payment. "I always

(1) 3 B. & P. 249.
(2) 11 Ad. & E. 438.
(3) 4 Q. B. 519.
(4) [1891] 2 Q. B. D. 509.
(5) Before MOLONY C.J., RONAN L.J., and WYLIE J.

admitted my liability, but I never was asked to do so in writing. In the end of the year 1920 the then manager, having informed me that the bank were not disposed to allow the matter to remain unsettled any longer, I communicated with my solicitors, who communicated with the solicitors who represented the several persons who were in possession of the property. . . . Subsequently, in June, 1921, I received a docket from the bank, stating that they had debited my account with the sum of £108 8*s.* 7*d.*, being the amount due on foot of the said promissory note. I did not draw any cheque for the amount, but I was advised that I could not dispute the bank's right to debit my account, seeing that the money was due, and the bank had in their hands as my bankers moneys exceeding the amount due on foot of the promissory note."

Leonard K.C. (with him *Carson*), for the appellant:—

This is not a case of a person who has voluntarily discharged the obligations of another. Though plaintiff, in June, 1921, could have pleaded the Statute of Limitations in an action brought against him by the bank, there was then an existing legal obligation for the payment of the money. This case is thus distinguishable from *Sleigh* v. *Sleigh* (1). In the circumstances plaintiff was "under a reasonable obligation and necessity to pay": *North* v. *Walthamstow Urban District Council* (2). The creation of the relationship of principal debtor and surety at the request of the principal debtor in February, 1914, involved implicitly promises by the principal debtor to the surety that the principal debtor would pay the debt and would indemnify the surety against any damage sustained by him by reason of the non-payment thereof.

The money paid by or charged against the plaintiff is therefore recoverable as being money paid by the plaintiff on behalf of and with the implied authority of the deceased. A principal debtor against whom the creditor could not recover by reason of the Statute of Limitations may become liable to his surety on the latter paying the creditor: *Gardiner* v. *Brooke* (3); *Wolmershausen* v. *Gullick* (4). In order to resist successfully the plaintiff's claim, the defendant must establish 1, that a banker's right of lien or set-off in regard to moneys of his customer placed with him on current or deposit account does not cover a statute-barred debt; and 2, that a surety is under an obligation to the principal debtor not to give an acknowledgment of the debt to the creditor. The Court will not readily hold that the surety's right to recover over against the principal debtor depends upon whether the former did or did not give such an acknowledgment to the creditor before payment. On the facts now in evidence the plaintiff is entitled to succeed if he can show that when the bank in June, 1921, debited his current account with the amount due on foot of the promissory note, such debit entry was an effective debit which the bank was entitled to make. A banker's lien, which is part of the law execepant, is not limited to securities, but extends to all moneys placed

(1) 5 Ex. 574.
(2) 62 I. P. 836.
(3) [1897] 2 I. R. 6.
(4) [1893] 2 Ch. 514.

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by a customer in his hands as banker, whether on current or deposit account, and covers a statute-barred debt: *Brandao* v. *Barnett* (1); *Misa* v. *Currie* (2); *Spears* v. *Hartly* (3); *Re Bromhead* (4); *Re Carter* (5); *Bower* v. *Foreign and Colonial Car Co., Ltd.* (6); *Roxburghe* v. *Cox* (7); *National Bank* v. *Broderick* (8). The last-mentioned authority is directly and expressly in point, and is in accordance with the principles of the earlier authorities and the propositions stated by all the text-writers: Grant on Banking, 6th ed., pp. 301, 307, 310; Hart on Banking, 3rd ed., pp. 808, 809, 810, 813; Halsbury, vol. i, pp. 585, 588, 620.

If in regard to moneys the banker's right might be more aptly described as "set-off" rather than "lien," the term "set-off" is then as loosely used as the term "lien," and is not limited in this connexion to the "set-off" formerly the subject of the statutes of set-off. Unlike the latter, the banker's "set-off" is not a claim to set off in an action, but takes effect when the banker makes the entry in exercise of his right. The nature of the banker's rights may be stated without using either term, "lien" or "set-off": 1. A banker is entitled to debit any account relating to moneys received by him as banker for or on account of a customer with any balance due by such customer on foot of any other account. 2. The making of such debit entry extinguishes the liability in respect of the old transferred balance, and the balance thereupon due to or by the banker, as the case may be, on foot of the account in which such debit entry has been made is the balance appearing after such entry is taken into account. 3. Provided that there is a legal obligation for the payment of such transferred balance, it may be so debited notwithstanding the fact that at the time it is not recoverable by action by reason of the Statute of Limitations.

S. L. Brown K.C. (with him *Charles Murphy*), for the respondent.

MOLONY C.J.:—

We do not think it necessary to call on Mr. Brown.

This was an originating summons asking on the part of the plaintiff as a creditor for an order for the administration of the real and personal estate of a man named James Timothy Aloysius Morris. It appears that Mr. Morris was the principal on a promissory note dated the 6th February, 1914, payable six months after date. There were two sureties to the note, one of whom is the plaintiff in the present proceedings. The principal debtor died on the 3rd July, 1914, and the promissory note was not met at maturity. The period fixed by the Statute of Limitations elapsed, and no payment or acknowledgment was made, and the debt became in the ordinary acceptation of the term statute-barred. The present plaintiff had an

(1) 12 Cl. & F., 787.
(2) 1 App. Cas. 554.
(3) 3 Esp. 81.
(4) 16 L. J. Q. B. 355.
(5) 55 L. J. Ch. 230.
(6) 22 W. R. 740.
(7) 17 Ch. D. 520.
(8) Unreported, except at 31 I. L. T. R. 65*n*.

account with the National Bank, Clifden, and in his original application before Mr. Justice Powell he represented that he had paid the bank the entire sum due when called upon by them to do so, after the Statute of Limitations had expired. There was no reference then made to the question now raised on this appeal of the lien of the bank.

The plaintiff says in the seventh paragraph of his original affidavit: "On the 22nd day of May, 1917, the bank were paid the sum of £26 1*s.* 5*d.* on foot of said promissory note, leaving a sum of £91 18*s.* 7*d.* due in respect of principal and interest thereon. The balance not having been paid, the bank called on me to pay the same, and on the 3rd day of June, 1921, I paid the bank the sum of £108 8*s.* 7*d.* in full discharge of principal and interest due to said date." Upon that statement the case was decided by Mr. Justice Powell, and his judgment is to the effect that the payment was a purely voluntary one of a statute-barred debt, and that there was abundant authority for the proposition that where the law did not compel or require the plaintiff to pay, he was not in a position to claim against the principal for the amount of the debt. When that decision was given counsel were apparently unable to dispute its accuracy. A fresh line has now been developed in an affidavit for use in this Court, which Mr. Leonard obtained leave to put in, and to the use of which Mr. Brown did not object. The object of this second affidavit is to alter the legal effect of the payment referred to in the first affidavit, by plaintiff setting up the case that he did not pay this money at all, as stated in the seventh paragraph of the first affidavit, but that the bank debited his account with the amount in pursuance of an alleged lien. He says in the new affidavit: "I received a docket from the bank stating that they had debited my current account with the sum of £108 8*s.* 7*d.*, being the amount due on foot of the said promissory note. I did not draw any cheque for the amount, but I was advised that I could not dispute the bank's right to debit my account, seeing that the money was due and the bank had in their hands, as my bankers, moneys exceeding the amount due on foot of the promissory note." On looking at the current account, we find that on the 3rd June the amount to credit previous to debiting the account with £108 8*s.* 7*d.* was £11 12*s.* 1*d.* The only subsequent lodgment during the period covered by the account was a sum of £12, so that, so far from having paid the bank £108 8*s.* 7*d.*, a sum of £84 16*s.* 6*d.* remained due to the bank at the close of the year. But it is said that the bank was entitled to recover this amount by virtue of the banker's lien, because, although the plaintiff had not paid them this amount, and had not money to meet it on his current account, they might have appropriated the plaintiff's deposit account to the amount of this debt, and he had money on deposit in excess of the sum claimed. If we get into the region of speculation, it is difficult to say on what principles the liability of banker and customer might or might not be adjusted. But the principles laid down in the authorities are perfectly clear. The relation of banker to customer is that of debtor and creditor. When you lodge money on current account you give it to the bank, subject to the right to draw against it to a sum equal to what you have lodged. On the same principle, if a bank has

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Molony C.J.

a debt against you, they have a right to set off that debt as against the money lodged by you which they have in their hands. What is popularly called the banker's lien is nothing more than the right of the bank to set off the amount due by you to them in respect of an actionable debt. If the debt has ceased to be actionable, the bankers right to set off also ceases. Mr. Leonard has advanced the net proposition that although such a balance may be irrecoverable by action by reason of the Statute of Limitations, nevertheless the bank is entitled to debit the amount, provided there is a legal obligation for the payment of it, which he says means that if the bank are able to get the money they are entitled to keep it. The only semblance of authority for that proposition which Mr. Leonard has been able to discover, either in text-book or case, is in a foot-note to the case *M'Donogh* v. *The National Bank* (1). In that case the County Court Judge held that the bank had a lien on deposit money for the amount of an overdue bill and interest, and were entitled to deduct same notwithstanding that the bill was barred by the Statute of Limitations.

It is stated in the note that in *The National Bank* v. *Broderick* (2) the Lord Chief Baron in giving judgment for the Exchequer Divisional Court (on motion that a verdict and judgment found and directed for defendant by O'Brien J. be set aside, and judgment entered for the plaintiff) laid down as the law the principle above decided by Judge O'Connor Morris. In that case the bank sued Broderick for an overdraft and interest. Defences of traverse and the Statute of Limitations were pleaded; and the defendant "set off" and counterclaimed in respect of money of his which the bank had held on deposit receipt and appropriated in satisfaction of statute-barred bills and interest. The bank pleaded lien and the usage of bankers as defence to the counterclaim, and this was held to be a good defence by the full Court of Exchequer.

If the decision of the Exchequer Division referred to in the matter is to be construed as entitling a bank in every case to set off the amount of a statute-barred debt as against a customer's account, I think that proposition has no foundation in law, and I decline to follow it.

Mr. Justice Powell's decision was right on the facts before him, and the facts opened for the first time on this appeal do not improve the plaintiff's case. The appeal must be dismissed with costs.

RONAN L.J.* :—

Mr. Leonard has unquestionably found in the text-books the expression "lien on money," but always in connexion with some other expression. But I have not heard from Mr. Leonard what the meaning of a "lien on money" by a banker is. If I deposit or lodge to my current account in a bank one hundred sovereigns, that instant it ceases to be my money and becomes the banker's to use as he thinks fit. If I draw money from a bank, the banker gives me the money: it ceases to be his. It becomes my money to use as I think fit. A

(1) 31 I. L. T R. 64. (2) Unreported.

* This judgment has not been revised by Ronan L.J.

bank account—that is to say, an account between banker and customer—consists simply of different sums paid by the one to the other. The only result of the payment from one to the other is that the property in the amounts paid over is transferred from one to the other, and the other becomes a simple contract debtor. In what possible sense then can a banker have a lien on money in his hands when the money is his own? How can he have a lien on his own moneys? To say so, to my mind, is simply nonsense.

The relation between banker and customer is that of debtor and creditor. Wholly different considerations arise in taking an account between banker and customer, in which case a balance may be struck at a particular date, and an immediate appropriation made. I agree with the Lord Chief Justice that the appeal must be dismissed.

WYLIE J.:—

I concur. Mr. Leonard's third proposition is that the right of lien on a balance of an account can be exercised, notwithstanding that the balance could not be recovered owing to the Statute of Limitations. I can find no authority whatever to support that proposition. The case referred to in the Irish Law Times Reports cannot, I think, be correctly reported. No other authority goes that length. The right of a bank is the ordinary right of set-off. It must be taken with the infirmities of set-off, and there is ample authority for the proposition that a statute-barred debt cannot be set off.

Solicitors for the plaintiff: *R. J. Connolly & Son.*
Solicitors for the defendant: *Barrington & Son.*

H. J. M'C.

Land Judges. *Wylie J.* 1922.

July 14, 25.

IN THE MATTER OF WILLIAM CLEARY, A REGISTERED OWNER OF LAND, DECEASED.

(FOLIO 3912. COUNTY GALWAY.)

Land Registry—Death of sole registered owner of land sold under Land Purchase Acts—Sale by personal representative to more than one person without consent of Land Commission—Right of transferees to be registered as owners—Local Registration of Title (Ireland) Act, 1891 (54 & 55 *Vict. c.* 66), *Part IV—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 54, *sub-s.* 2.

Section 54, sub-s. 2, of the Irish Land Act, 1903 (3 Edw. 7, c. 37), which provides that not more than one person shall, without the consent of the Land Commission, be registered as the owner of the holding under Part IV of the Local Registration of Title (Ireland) Act, 1891, does not apply to purchasers for value from the personal representative of a deceased registered owner of land which had been sold under the Purchase of Land Acts, and several persons so purchasing as tenants in common are entitled to be registered as owners notwithstanding that the Land Commission have not consented thereto.

APPEAL from an order of the Registrar of Titles refusing the application of Patrick Morrissey and twenty-seven other persons to be registered as owners of the lands in Folio 3912, County Galway.

William Cleary was sole registered owner of these lands, which had been sold to and vested in him under the Land Purchase Acts. He died on the 27th November, 1911, having made his will, of which he appointed Edward Rothwell the executor. Probate was granted to Edward Rothwell on the 3rd May, 1912, and he sold, and, by deed dated the 14th December, 1920, transferred, the land to Patrick Morrissey and twenty-seven other persons. The Land Commission did not consent to the registration of the transferees as owners; but they notwithstanding claimed to be so registered. The Registrar refused their application on the ground that in such circumstances sect. 54, sub-s. 2, of the Irish Land Act, 1903 (3 Edw. 7, c. 37), was an absolute bar to registration.

Hannan, for the applicants:—

My submission is that sect. 54, sub-s. 2, of the Act of 1903 has no application to the right to registration of a purchaser or purchasers from the personal representative of a deceased registered owner. An examination of Part IV will satisfy the Court that sect. 54, sub-s. 2, was intended to apply only to the rights of registration of the devisees who would become entitled under the will, or the next-of-kin who would become entitled on the intestacy of a deceased registered owner. It does not apply at all to the rights to registration of one or several purchasers from the personal representative. Part IV of the Act of 1891 consists of seven sections (83 to 89). Of these sections four (83 to 86)

deal with the processes of the devolution and administration of registered land. Sect. 87 alone of Part IV deals with registration, and only with the rights to registration of devisees and next-of-kin, not with those of purchasers. The only registration which can be had under Part IV of the Act is a registration under that section.

It will be argued, because sects. 84, 85, and 86 vest the land for the purpose of administration in the personal representative, that the rights of a purchaser from the personal representative therefore arise under Part IV. It must be admitted that the personal representative makes title by virtue of Part IV; but the very sections by which the land is vested in the personal representative provide, in effect, that the exercise of the powers of sale by the personal representative shall be under, not Part IV, but the earlier parts (under sects. 35 and 36). Sects. 84 and 86 give the personal representative the same powers of dealing with the land as if he were a registered owner, and a registered owner can transfer to as many persons as he pleases by a transfer inter vivos: sect. 64, sub-s. 2. The only restrictions on the rights of disposition of a registered owner are those against subdivision and subletting contained in sect. 54, sub-s. 1, of the Act of 1903 and in the earlier Acts (notwithstanding which provisions, see the decision in *In re Mary Geoghegan* (1)).

The policy of the law is that a personal representative in due course of administration should have the same power of alienation as the deceased. Prima facie the personal representative has the same power of sale as the deceased had unless this is expressly restricted by statute. The nature of the restrictions on alienation and of the provision in fact made for the happening of breaches of such restrictions by the Irish Land Code show that no restriction was intended to be made on the power of sale of a personal representative.

Take sect. 54, sub-s. 1. of the Act of 1903. There is first the restriction as to subdivision and subletting; secondly, as to bankruptcy; and, thirdly, as to two or more persons becoming entitled under the will or intestacy of a deceased registered owner. This section merely re-enacts, with some modifications, the provisions of the earlier Land Acts. The absence of any restriction on the power of sale of a personal representative is remarkable. But, in addition, there is express provision made by these Acts for what is to happen on subdivision, subletting, bankruptcy, or two or more persons becoming entitled as devisees or next-of-kin on death.

What is to happen in the case of purchasers who have paid purchase-money, but cannot make title because they are refused registration? There is no provision made for them. This fact would indicate that the power of sale conferred on personal representatives indirectly by Part IV was not intended to be affected by sub-s. 2 of sect. 54, but was intended to be left as large as the power of sale of the deceased registered owner. If the power of sale of a personal representative were intended to be restricted by sect. 54, sub-s. 2, it is reasonable to suppose that some provision would be made for a breach of the restriction, such as that made in sub-s. 1, which empowers a compulsory sale if the Land Commission refuses its assent.

(1) [1918] 1 I.R. 188.

Land Judges.
Wylie J.
1922.
In re CLEARY.

D. M'Carthy Mahony, for the Irish Land Commission:—

The disposition under which the applicants claim is a conveyance to them by the personal representative of William Cleary of land of which he at his death was seised in fee-simple. If the Act of 1891 did not contain the provisions in Part IV, that conveyance would be waste paper, and the application for registration would be futile. Part IV, however, headed, "Devolution of interest in freehold registered land sold under Purchase Acts," and consisting of sects. 83–89, applies to this land (sect. 83); and under sect. 84, sub-s. 1, on William Cleary's death the land devolved to and became vested in his personal representative as if it were a chattel real vesting in him. Sect. 84, sub-s. 3, provides that in such case the personal representatives shall alone be recognized by the registering authority as having any right in respect of the land, and shall have the same power of dealing with the land, and any registered dispositions by them shall have the same effect, as if they were the registered owners of the land. Accordingly, under these two sections (*a*) the fee-simple vests in the personal representative; (*b*) he alone is to be recognized by the registering authority as having any right; (*c*) it is not contemplated that the personal representative shall himself be registered as owner, and this is the interpretation which has in practice always been put upon these provisions; but (*d*) the personal representative may deal with the land, and a disposition by him must be registered; and (*e*) such disposition when registered has the same effect as if the personal representative were the registered owner of the land—a reference to sect. 35, under which it is only a registered owner who can transfer the land and give the right to his transferee to be registered as owner. These two sections revolutionize the law; they, and they alone, could justify the registration of the applicants, and what the applicants seek is necessarily that they be registered as owners under Part IV of the Act of 1891; they have no other right, and save under that part there is no power to so register them. No case comes so plainly within sect. 54, sub-s. 2, of the Act of 1903 as the present. The Act of 1891 (sect. 38) preserved statutory prohibitions and restrictions on alienation, subdivision, etc.

It is not correct to say that sect. 87 alone of the provisions of Part IV deals with registration. As pointed out already, sub-s. 3 of sect. 84 not only refers to recognition of the personal representatives by the registering authority, but expressly requires that a disposition by the former must be registered; it is only a registered disposition that shall have the same effect as if they were the registered owners. Carried to its logical length, the argument put forward in this connexion would confine the operation of sect. 54, sub-s. 2 (Act of 1903), to the two special cases provided for in sub-sects. 2 and 4 of sect. 87.

Neither is it correct to say that the exercise of the power of dealing with the land by the personal representatives is under the earlier parts of the Act; such exercise is to have the same effect as if it were so. Moreover, it does not advance the case of the applicants that under the Act of 1891, by itself, a registered owner could transfer to as many persons as he pleased, or that presumably a personal representative should have as extensive a power of alienation as the deceased. The question is: what restrictions does the Act of 1903 impose?

Sect. 30, sub-s. 1, of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), had provided that as between the Land Commission and the proprietor of a holding subject to a land purchase annuity—(*a*) the holding should not be subdivided or let without consent; (*d*) where on the decease of the proprietor the holding would, by reason of any devise, bequest, intestacy, or otherwise, become subdivided, the Land Commission might require it to be sold to some one person. It was probably at first thought that a conveyance to more than one person would amount to a subdivision of the holding, and the words "to some one person" in clause *d* would support this construction. That was apparently an erroneous view; and sect. 54, sub-s. 1 (*c*), of the Act of 1903 seems to recognize this. This sect. 54 goes farther than the earlier provision. Sub s. 1 (*c*) extends sect. 30, sub-s. 1 (*d*) (1881), by adding after "subdivided" the words "or vested in more than one person," while sub-s. 2 contains an absolute prohibition against registering more than one person under Part IV. It may seem strange that the Act of 1903 did not extend the general restriction on subdivision in the earlier Act by applying it to a vesting in more than one person, thus leaving the anomaly that it is only on the decease of an owner that not more than one person can be registered; but this consideration cannot diminish or affect the restriction placed in that case on registering more than one.

Sub-s. 1 (*c*), with its proviso, and sub-s. 2 of sect. 54, hang together; the latter prevents what might interfere with the rights of the Land Commission under sub-s. 1 (*c*), and that clause enables the Land Commission to prevent the deadlock which would arise from sub-s. 2 by enabling the Land Commission to require a sale to one person or to nominate some person to be proprietor. The words "or otherwise" in sub-s. 1 (*c*) cover the present case; but it would be only on the registration of the applicants that the holding would become vested in more than one person, and accordingly if sub-s. 2 did not apply, either the personal representative could defeat the rights of the Land Commission, or the Land Commission could destroy the registered title of the applicants. It cannot therefore be contended that sub-s. 2 does not apply, because a sufficient remedy is given by sub-s. 1 (*c*). On the other hand, if this case does not come within sub-s. 1 (*c*), there is no ground for contending that the positive general provision of sub-s. 2 does not apply.

Sub-s. 2 is perfectly general, and contains an absolute prohibition against registering more than one person. On the argument for the applicants, how far is it to be restricted and to what does it apply? Could three next-of-kin require a transfer to themselves? Could a personal representative requiring, say, £300 for debts and expenses convey the land to several next-of-kin or devisees in consideration of that sum? If a registered owner devised his land to three sons subject to £200 for a daughter, could the executor convey to the sons on payment of that amount? If a testator directs his executor to sell to his two sons for such sum as the land would fetch in the market, could the executor do so notwithstanding sub-s. 2?

A purchaser completing in face of the restriction in sub-s. 2 does so at his peril. This restriction must be noted on the register.

Hannan, in reply.

Cur. adv. vult.

Land Judges. Wylie J. 1922. *In re* CLEARY. July 25.

WYLIE J.:—

William Cleary, who was the registered owner of the land comprised in Folio 3912, County Galway, died on the 27th November, 1911. Edward Rothwell was his sole executor, and probate was granted to him on the 3rd May, 1912. By transfer, dated the 14th December, 1920, Edward Rothwell as such executor transferred the lands to Patrick Morrissey and twenty-seven others as tenants in common. The purchasers wish to have the transfer registered, the Land Commission have not consented, and the question I have to decide is: are the purchasers entitled to be registered without such consent?

Mr. M'Carthy Mahony, for the Land Commission, relies on the provisions of sect. 54, sub-s. 2, of the Irish Land Act of 1903, and says that that sub-section is an absolute bar to registration without consent, as but for Part IV of the 1891 Act no sale by an executor was possible, and that therefore this transfer is a transfer under Part IV. He further says that a sale to such a large number of persons is antagonistic to the policy of the Land Acts. I cannot see how on principle it matters whether the sale is to two or two hundred.

On examining the Act of 1891 one finds that it is not repugnant to that Act to have two or more persons registered as proprietors of a holding (sect. 64, sub-s. 2). One also finds that undoubtedly the scheme of the Act was to simplify and assist the transfer of land rather than to obstruct. The one essential is that the transfer is to appear on the register, and no title is acquired until such registration is complete (sects. 35 and 36).

Indeed, Mr. Mahony frankly admits that William Cleary in his lifetime could have transferred his holding to these twenty-eight purchasers, and no consent would have been requisite for their registration. He further admits that the executor could have sold to one person to-day, and that person could have sold to two hundred to-morrow, and that the absence of consent could not stop the registration of the two hundred.

If the Land Commission's contention is correct, the remarkable result is therefore arrived at that, although Part IV of the 1891 Act was obviously included in that Act to complete the scheme of registration, and (inter alia) enable an executor to sell, yet sect. 54, sub-s. 2, of the 1903 Act must be held to have said in the case of a sale by an executor, it must be only to one person unless the Land Commission consent. It is quite possible that this is so; but if there is any other construction which can be placed on sub-s. 2 by which such a result could be avoided, I should be inclined to adopt it.

Looking at the provisions of sect. 54, sub-s. 1, which has already received judicial interpretation in *In re Mary Geoghegan* (1), I find that it enables the Land Commission in certain eventualities to cause the holding to be sold. One of these eventualities is when as a result of a devise or bequest the holding would become vested in two or more persons.

Turning to sect. 87 of the 1891 Act, a personal representative is therein empowered to assent to a bequest and transfer of the land to the legatee. In sub-s. 4 the assent, when produced, authorizes the regis-

(1) [1918] 1 I. R. 188.

tering authority to register the person named in such assent. I have no doubt that "person" includes "persons," and, accordingly, if in this case the land had been left by will to the twenty-eight persons now applying to be registered, and an assent had been produced from Edward Rothwell, they would be entitled to be registered, and the Land Commission would have been driven to their remedy under sect. 54, sub-s. 1 (*c*), of the 1903 Act.

Mr. Mahony says that sub-s. 2 of sect. 54 also applies to this case, and is an absolute bar to registration. I cannot think this is so, as, if sub-s. 2 in all cases stops registration, then sect. 54, sub-s. 1 (*c*), is a nullity; there is no subject-matter for it ever to operate on, for there can be no registration, and therefore no estate passes (sect. 35, sub-s. 2, 1891 Act), and there could be no necessity for the Land Commission to sell.

If, then, two or more persons in whom land becomes vested "by reason of any devise, bequest, intestacy, or otherwise," can be registered, and the Land Commission have only a right of sale, can it be argued that if the executor sells no registration can be effected unless by consent? I think not, and my view is that sub-s. 2 was meant to apply, and does only apply, to what I may term the executory period —to the time before the assent to the sale, before the final transfer.

Its intention was to stop a number of persons who were purely representatives of the "persona" of the deceased from appearing on the register, and it did not apply to a transfer by such representatives to the person or persons who were the actual future owners. The result of this is that I must reverse the decision of the Registrar, and declare the applicants entitled to be registered.

Solicitor for the applicants: *L. A. Conroy.*
Solicitor for the Irish Land Commission: *Henry M. P. Hare.*

T. C. T.

Ch. Div. *(S. I.)* 1922.

June 26.

In the MATTER of the COMPANIES (CONSOLIDATION) ACT, 1908, and in the MATTER of the PORTARLINGTON ELECTRIC LIGHT and POWER COMPANY, Ltd. (1).

(1922. No. 310.)

Company—Winding up—Compulsory order—Company registered in England and carrying on business in Southern Ireland—"Unregistered" Company—Treaty—Irish Free State (Agreement) Act, 1922 (12 *Geo.* 5, c. 4)—*Jurisdiction of Courts of Southern Ireland—Whether company a "foreign" company.*

The Portarlington Electric Light and Power Company, Ltd., was incorporated as a limited company under the Companies Acts on the 19th August, 1913, and had its registered office in London. By resolution dated the 3rd April, 1922, C. was appointed a liquidator in the voluntary winding up of the company. On 31st March, 1922, the Irish Free State (Agreement) Act (12 Geo. 5. c. 4) was passed, confirming the Articles of Agreement for a treaty between Great Britain and Ireland, signed the 6th December, 1921. The Act took effect from the 31st March, 1922. Under the Articles of Agreement Ireland was declared to have the status of the Dominion of Canada. Under the Provisional Government (Transfer of Functions) Order, 1922, dated 1st April, 1922 (London *Gazette*, 4th April, 1922), the functions of certain departments, including the Board of Trade, were transferred to the Provisional Government of Southern Ireland, set up in accordance with the Articles of Agreement of December, 1921. On petition by a shareholder for the compulsory winding up of the company as an unregistered company: *Held*, that notwithstanding the provisions of the Articles of Agreement of December, 1921, the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), and of the orders thereunder, the provisions of the Companies Acts remain in full force until revoked or altered by a competent legislature, and that the courts of Southern Ireland had no jurisdiction to make the order sought for in the petition.

Petition.

On the 19th April, 1913, the Portarlington Electric Light and Power Company, Ltd., was incorporated under the Companies Acts, the registered offices being at 66 Victoria Street, Westminster, London, S.W. 1. The company, however, carried on business in and had its assets in Southern Ireland. The nominal capital was £3,500, divided into 3,250 Preference Shares of £1 each and 250 Ordinary Shares of £1 each. The petitioner, Patrick Joseph Weymes, held 536 shares. On the 27th October, 1919, the company issued debentures, of which the petitioner held 250. These debentures were deposited by the petitioner with the Munster and Leinster Bank, Ltd., as security. On the 3rd April, 1922, a resolution was passed by the shareholders for the voluntary winding up of the company, Mr. Michael Curley being appointed liquidator. The petitioner alleged that he had no notice of this winding up; but Mr. Curley in his affidavit stated that the petitioner had full notice of the meeting at which the resolution was passed and of the intention to appoint a liquidator. On the 22nd April, 1922, a meeting of the creditors of the company was held, at which the appointment of Mr. Curley as liquidator was confirmed. The petitioner took the protection of the Court, and in reply to a letter from his accountant asking the value of the shares held by petitioner,

(1) Before Samuels J.

Mr. Curley wrote that, pending realization of the company's assets, it was unwise to take any amount as available for the shareholders. Mr. Curley also gave to the petitioner's accountant particulars of the meeting on the 22nd April, 1922.

The petitioner alleged that previous to the voluntary winding up of the company offers of £3,000 had been made for the company's business, and in his petition he sought for an order compulsorily winding up the company on the grounds that by reason of the provisions of the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), and orders thereunder, and the law relating to colonial companies, such orders could be made by the Court in respect of the company as an unregistered company, and the petitioner was apprehensive that the liquidator might sell the property at an undervalue. The petition was filed on the 24th May, 1922, and copies were served on the liquidator and at the registered offices of the company.

A. Dickie K.C. and *James Geogheyan*, for the petitioner:—

A constitutional question arises. We contend that the effect of the provisions of the Articles of Agreement of 6th December, 1921, as confirmed by the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), and of the statutory orders made under that statute, is, as from the 31st March, 1922, to determine the jurisdiction of English Courts over companies carrying on business in Southern Ireland. Such companies registered in England under the law since the 31st March, 1922, must be treated in the way in which foreign companies carrying on business in this country would be treated. Under the Articles of Agreement the status of the Dominion of Canada is conferred upon Ireland. Further, the Provisional Government (Transfer of Powers) Order, 1922, expressly transferred the functions of several administrative departments of State to the Provisional Government, and under these orders the control of the Board of Trade over companies carrying on business in Southern Ireland has been transferred to the appropriate Minister of the Provisional Government. The position of this company is that of an unregistered company under sect. 268 of the Companies (Consolidation) Act, 1908 (8 Ed. 7, c. 69): *Re Commercial Bank of India* (1), *Commercial Bank of South Australia* (2), *Re Australian Joint Stock Bank* (3), *Re Matheson Brothers, Ltd.* (4), Buckley on Companies, p. 547. Under the existing legislation the definition of "unregistered" company in sect. 267 of the Companies (Consolidation) Act, 1908 (8 Ed. 7, c. 69), i.e., that "unregistered" shall not include any company "registered under the Companies Act, 1862," must be read as "registered in Ireland under the Companies Act, 1862."

S. L. Brown K.C. and *St. L. Devitt*, for the liquidator.

The provisions of the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), and the orders thereunder do not affect the position of companies as regulated by the Companies Acts. That Act remains in force here as a whole, unless and until it is altered or revoked by a competent legislature.

(1) L. R. 6 Eq. 517.
(2) 33 Ch. D. 174.
(3) [1897] W. N. 48.
(4) 27 Ch. D. 225.

Ch. Div. (*S. I.*) 1922.

In re PORTARLINGTON ELECTRIC LIGHT CO.

SAMUELS J. (for POWELL J.) :—

This is a far-reaching application, and if it is decided as Mr. Dickie contends it should be decided, it would affect a number of statutory provisions. Mr. Dickie based his argument on the high constitutional ground that the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), enacted (sect. 1, sub-s. 1) that "the Articles of Agreement for a treaty between Great Britain and Ireland set forth in the schedule hereto shall have the force of law," and the Orders in Council made under sect. 1, sub-s. 2, of that statute have the effect of altering the application of the Companies Acts in respect of companies carrying on business in Ireland.

The Irish Free State is to have "the same constitutional status in the community of nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa." This provision is, however, very far from being an enactment repealing ipso facto statutes affecting the rights and properties of individuals and corporations domiciled in England or Ireland, and possessing assets in this country. The Orders in Council made under clause 17 of the Articles of Agreement are made "by way of provisional arrangement" for administration during the interval between 6th December, 1921, and the constitution of the Parliament and Government of the Irish Free State; and the Orders made under sect. 1, sub-s. 2, of the Irish Free State (Agreement) Act, 1922, are for the transfer to the Provisional Government of powers and machinery necessary for the discharge of that Government's duties. Such arrangement is not to continue longer than a period of twelve months from the 6th December, 1921.

The Orders in Council of the 1st April, 1921, transfer the administrative powers of the Board of Trade in certain matters to the Ministry of Finance of the Provisional Government, and in other matters to the Ministry of Economics, but nothing in the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), or the Orders in Council thereunder interferes with the rights of the English Courts to wind up a company registered in England. Neither is there anything in these statutory provisions which affects the application of the definition in sect. 267 of the Companies Act, 1908 (8 Ed. 7, c. 69), of "unregistered" company, so as to make a company registered in England under the Joint Stock Companies Acts and doing business in Ireland henceforth liable to be wound up in Ireland, or, if registered in Ireland, to be wound up in England.

As to the administrative side, there is no difficulty. The English Courts, as heretofore, can get the assistance of the Irish Courts or of the appropriate departments in Ireland to carry out necessary arrangements in Ireland. All these orders under Article 17 of the treaty or under sect. 1, sub-s. 2, of the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), are provisional, and are to be interpreted so as to interfere as little as possible with existing rights under statute or common law. This is an English company, and under the existing law the Irish Courts have no power to wind up this company under the provisions of the Companies Act.

[His Lordship then referred to the merits of the application, which are not material to this report.]

Solicitors for the petitioner: *William Smyth & Son.*
Solicitors for the liquidator: *William Croskery & Son.*

C. N. K.

JOHN MAHER LOUGHNAN, PLAINTIFF, *v.* EUGENE O'SULLIVAN AND, BY ORDER, JEREMIAH O'SHEA, DEFENDANTS. AND BY ORDER TO PROCEED, JOHN MAHER LOUGHNAN, ALFRED GEORGE HOLLINSHEAD, AND JOHN SCULLY, OFFICIAL AND CREDITORS' ASSIGNEES OF SAID JOHN MAHER LOUGHNAN, A BANKRUPT, PLAINTIFFS, *v.* EUGENE O'SULLIVAN AND JEREMIAH O'SHEA, DEFENDANTS (1).

Appeal.
(S. I.)
1922.
July 20.

(1918. No. 911.)

Set-off—Equitable set-off—Form of debt—Effect of Judicature Acts—Procedure—Present debt—Mutual debts—Discretion of Court.

In an action upon a contract for the sale of lands, the plaintiff L., on further consideration of the action, was declared entitled to rescind the contract, and to recover from the defendant O'S. a sum of £1,253 6*s.* 7*d.* for rents and profits of the said lands, and costs of the action taxed at £353 10*s.* 9*d.* Against this O'S. was declared by O'Connor M.R. entitled to set-off (*a*) the amount of his deposit money, (*b*) £4,030 9*s.* 5*d.* alleged to be due by L. to him on foot of certain mortgages, (*c*) £858 18*s.* 6*d.*, certain costs ordered to be paid by L. to O'S. and K. jointly, and (*d*) £57 6*s.* 7*d.*, the costs of a summons under the Courts (Emergency Powers) Act, giving O'S. leave to realize the said mortgages.

The plaintiffs appealed against (*b*), (*c*), and (*d*) being allowed as items of set-off.

Held, reversing the Master of the Rolls, 1, that as regards (*b*), the mortgages having been made to the mortgagees, who, when L. became an arranging debtor in 1915, stood on their security and did not claim for the debt, the plaintiff's personal liability in respect thereof had ceased, and that as no debt existed in respect of which he could be sued, (*b*) could not be the subject of a set-off.

2. That the costs in item (*c*) being a debt due by L. to O'S. and K. jointly, could not be set off against a debt due to L. by O'S. alone. Though, since the Judicature Acts, regard must be had to equitable rights, and the exact nature of the debt looked to, yet the rule that the debts sought to be set off must be mutual and in the same right still holds good.

Bourne v. *Bennett* (1 M. & P. 141 and 4 Bing. 423) distinguished.

3. That the costs in item (*d*) being simply made by the order "costs with demand." and not payable by anyone, were not a personal debt against the plaintiff, and could not be set off.

Judgment of the Master of the Rolls varied accordingly.

By a contract of sale, dated the 28th March, 1916, the plaintiff, John Maher Loughnan, sold to the defendants, Eugene O'Sullivan and Jeremiah O'Shea, his three farms of Gortroe West, East, and Middle for the sum of £1,500, O'Sullivan contributing £650 for Gortroe West and O'Shea £850 for Gortroe East and Middle. The deposit on the purchase money amounted to £375, of which O'Sullivan paid £125 and O'Shea £250.

Under the conditions of sale the plaintiff, as vendor, was entitled to rescind the sale if unable to comply with any requisitions; and difficulties having arisen on the title, he served notice of rescission on September 14th, 1917, which O'Shea accepted, but the validity of which was disputed by O'Sullivan. Shortly afterwards the plaintiff

(1) Before MOLONY C.J., RONAN and O'CONNOR L.JJ.

Appeal. (*S. I.*) 1922.

LOUGHNAN *v.* O'SULLIVAN.

issued a writ against O'Sullivan only, for a declaration that the contract under which he had sold the lands of Gortroe was properly rescinded by him by the notice of rescission. O'Sullivan, in his defence, denied the validity of the notice, and counterclaimed for specific performance of the contract.

When the case first came before him, the Master of the Rolls required O'Shea to be served with the statement of claim, which was done, and a defence filed by him. This was subsequently struck out on his refusal to comply with an order for discovery. The case accordingly came on for trial against the defendant O'Sullivan, and on motion by the plaintiff for judgment in default of defence against O'Shea. By his judgment, dated March 21st, 1920, the Master of the Rolls declared the plaintiff entitled to rescind the contract, and that it had in fact been rescinded by him by his notice of the 14th September, 1917, and that the plaintiff was bound to account for the sum of £375 paid to him as deposit on the sale. His Honor also directed an account of the rents and profits of the lands received by O'Sullivan, and directed him to pay the plaintiff his costs of the action, but "without prejudice to any claim of the said defendant, Eugene O'Sullivan, to set off the costs hereinbefore awarded against any sum due to him by the plaintiff."

The action was then continued in Chambers, the issue being mainly the amount to be fixed for occupation rent. On February 11th, 1921, the plaintiff was adjudicated a bankrupt, and an order was made on May 6th, 1921, giving the assignees liberty to continue the proceedings. Ultimately, by his certificate of January 18th, 1922, the Chief Clerk found the amount due by the defendant O'Sullivan in respect of rents and profits to be the sum of £1,263 8*s*.

The action came before the Master of the Rolls on further consideration on March 15th, 1922, the defendant having served notice of his intention to apply to have certain sums alleged to be due to him by the plaintiff set off against the amount due by him for rents, profits, and costs.

The Master of the Rolls, having reserved judgment, on April 6th, 1922, made an order declaring the defendant, Eugene O'Sullivan, entitled to set off against the costs awarded by the judgment of March 30th, 1922 (taxed to £353 10*s*. 9*d*.), and the sum of £1,253 6*s*. 7*d*. (being the above-mentioned sum of £1,263 8*s*., less the amount paid for rates by the defendant), the following items:—

(*a*) The sum of £125 and interest thereon, being the amount of the deposit paid by the defendant.

(*b*) The sum of £4,030 9*s*. 5*d*. due by the plaintiff, John Maher Loughnan, to the defendant, Eugene O'Sullivan, in respect of certain mortgages and deeds of charge affecting the lands of Gortroe, dated respectively March 18th, 1910, July 10th, 1910, and April 13th, 1912, made between the plaintiff and the National Bank, Limited, and since assigned by the bank to the defendant.

(*c*) The sum of £853 18*s*. 6*d*., being the amount of the costs due by the plaintiff, John Maher Loughnan, under the judgment dated May 17th, 1920, in an action in the King's Bench Division entitled, "1919. 3085. John Maher Loughnan, plaintiff; Rt. Hon. the Earl of Kenmare and Eugene O'Sullivan, defendants."

(*d*) The sum of £57 6*s.* 7*d.*, being the amount of the costs due by the plaintiff Loughnan, pursuant to an order dated April 10th, 1920, made in the matter entitled, "Chancery Division—Master of the Rolls—Record No. 1919–322. In the Matter of the Courts (Emergency Powers) Acts, 1914–1918, and in the Matter of an intended action—Eugene O'Sullivan, plaintiff; John Maher Loughnan, defendant"; and he made both parties abide their own costs since March 30th, 1922.

With regard to the mortgages mentioned in item (*b*), the plaintiff, in 1915, was an arranging debtor, and carried a composition with his creditors. The National Bank at this time elected to stand on their security, and did not claim in the arrangement in respect of their debt.

The action mentioned in item (*c*) was one brought by Loughnan against the Earl of Kenmare and O'Sullivan for £5,000 damages for conspiracy, for a declaration that the assignment dated February 25th, 1919, of the mortgages at item (*b*) was in trust for the plaintiff, and to set aside a bill of sale. The defendants denied the charges, and O'Sullivan counterclaimed for the amount then due on foot of the mortgages.

The plaintiff failed in his action, and an order was made that the defendants, the Earl of Kenmare and Eugene O'Sullivan, should recover the costs of the action from the plaintiff.

The plaintiff appealed against so much of the order of the Master of the Rolls as declared the defendant entitled to set off items (*b*), (*c*), and (*d*), and claimed his costs since 30th March, 1922.

A. F. Blood K.C. (with him *H. Moloney*), for the appellant:—

The items allowed by the Master of the Rolls to be set off against the plaintiff's costs and against the amount certified by the Chief Clerk are all three incapable of being set off. Item (*b*), the £4,030 9*s.* 5*d.* on foot of the mortgages of 1910 and 1912, originally given by Loughnan to the National Bank, and transferred by them to O'Sullivan, are non-existent as a debt, because Loughnan carried an arrangement with his creditors in 1916 and obtained his certificate of conformity. The bank had notice of the sittings, but did not prove in the arrangement for the mortgage debt, which therefore became barred by the composition under sect. 346 of the Bankruptcy Act, 1857.

As to item (*c*), £853 18*s.* 6*d.* for costs awarded in the King's Bench Division in an action of *Loughnan* v. *Lord Kenmare and O'Sullivan* (1), these costs are due to Lord Kenmare and O'Sullivan jointly, and a joint liability cannot be set off against a separate liability. (*Re Willis, Percival, & Co.* (2); Halsbury's Laws of England, vol. xxv, p. 494.)

As to item (*d*), £57 6*s.* 10*d.*, the costs of a summons by O'Sullivan against Loughnan in the Chancery Division for liberty to realize the mortgages, the form of the order there was "costs with demand," and this does not create a personal liability on the part of Loughnan. Whilst the discretion of the Court to allow a set-off is admitted (as held by Pim J. in *Young* v. *Mead* (3)), none of the three items in this case creates a liability to which the rules of set-off apply.

(1) Not reported. (2) 12 Ch. D. 491. (3) [1917] 2 I. R. 85.

Appeal. (*S. I.*) 1922.

LOUGHNAN *v.* O'SULLIVAN.

H. D. Conner K.C. and *Timothy Sullivan K.C.* (*B. Roche* with them), for the respondents :—

As to item (*b*), the costs may be regarded as divisible equally between Lord Kenmare and O'Sullivan, and the rule against setting off debts owed jointly against debts owed separately does not apply. *Bourne* v. *Bennett* (1) is authority for the proposition that A can set off against a claim by C a debt due by C to A and B jointly. The Court of Chancery had always an equitable discretion, and the Judicature Acts enable the Court to inquire as to who is the beneficial owner of the debt. O'Sullivan was in possession of the lands for two years as mortgagee, and therefore there should have been no order as to rents and profits.

[MOLONY C.J.: But you have not appealed against the findings as to rents and profits]

MOLONY C.J.:—

In this case there was a contract of sale entered into on the 28th March, 1916, between the plaintiff and the two defendants, Eugene O'Sullivan and Jeremiah O'Shea. The purchase-money of the farm of Gortroe was £1,500, and in respect of that it appears that a deposit of £375 was made up of two sums, £125 being the contribution of O'Sullivan and £250 the contribution of O'Shea. Some difficulty having arisen as to the title to the lands, the plaintiff, John Maher Loughnan, served notice to rescind, and the validity of that notice having been impeached, the plaintiff brought an action against O'Sullivan in the first instance, and not against O'Shea, because it was stated that O'Shea accepted the notice to rescind. When the case came before the Master of the Rolls, however, he directed that the statement of claim should be served on O'Shea. O'Shea put in a defence which was subsequently struck out for non-compliance with an order for discovery, and accordingly the action came on for trial against O'Sullivan, and on motion for judgment in default of defence against O'Shea.

By a decree of the Master of the Rolls dated the 31st March, 1920, it was declared that the plaintiff was entitled to rescind, and an order was made against O'Sullivan for an account of the rents and profits of the lands. By the same judgment it was declared that the plaintiff was entitled to the costs of the action when taxed and ascertained.

The matter then went into Chambers, and by the Chief Clerk's certificate a sum of £1,263 8*s.* was found to be due in respect of the account for rents and profits; and the costs of the action up to that date having been taxed at £353 10*s.* 9*d.*, there was altogether due to the plaintiff, apart from any question of set-off, a sum of £1,606 10*s.* 9*d.*

The case then came before the Master of the Rolls on further consideration on the 6th April, 1922, and he thereupon made an order in favour of the plaintiff for a sum of £1,263 6*s.* 7*d.*; but he declared the defendant O'Sullivan entitled to credit for certain items in respect of a set-off, and these items were set out in a notice of motion on

(1) 1 M. & P. 141; 4 Bing. 423.

behalf of the defendant on the 7th March, 1922, and are dealt with specifically in the order of the Master of the Rolls of the 6th April, 1922, in the following way:—In paragraph (*a*) of the order he allows the sum of £125, being the portion of the deposit paid by the defendant. So far as regards that sum, there is no controversy on this appeal. It is admitted to be a valid item of set-off.

He then allows (par. (*b*)) the sum of £4,030 9*s.* 5*d.* due by the plaintiff Loughnan to the defendant O'Sullivan in respect of certain mortgages and deeds of charge dated, respectively, 18th March, 1910, 10th July, 1910, and 13th April, 1912, made between the plaintiff and the National Bank, Ltd., affecting the lands, and which had been assigned by the bank to the defendant. As regards this latter sum, it is not disputed that the plaintiff in the year 1915 was an arranging debtor, and that in the matter of the petition for arrangement the bank elected to rest on their security, and did not claim in the arrangement matter for the amount of their debt. The effect of that was that, on the arrangement being carried through, the personal liability on the debt ceased, and that no subsequent action could be brought for payment in respect of the covenants contained in the deeds. Consequently, when that sum is claimed to be set off as a debt due by the plaintiff to the defendant, who had taken an assignment of the sum from the bank, the simple answer is that there is no specific debt in existence since the arrangement matter in respect of which a person could sue or claim a valid set-off.

As to paragraph (*c*), the Master of the Rolls allows a sum of £858 18*s.* 6*d.*, being the amount of the costs due by the plaintiff under a judgment dated 17th May, 1920, in an action in the King's Bench Division entitled, "1919. 3085. John Maher Loughnan, plaintiff; Right Hon. the Earl of Kenmare and Eugene O'Sullivan, defendants." It is unnecessary to go into the facts of that case; suffice it to say it was an action against two defendants as joint tort-feasors. That action failed, and the two defendants recovered a joint judgment against the plaintiff. It was contended in the first place, but not with much insistence, by Mr. Conner, that this joint judgment could be set off as against the liability; and, secondly, that if the full sum could not be set off, at least a moiety could be recovered. That contention seems to be in violation of well-settled principles, which have been laid down in a number of cases the authority of which has never been questioned. A debt due from a plaintiff to a defendant and another jointly cannot be set off against a debt due to the plaintiff from the defendant alone. That appears to be clear from the case of *Bowyear* v. *Pawson* (1). The principle is also laid down in *Arnold* v. *Bainbridge* (2) and in *Stumore* v. *Campbell & Co.* (3).

There is one slight qualification on the generality of the statement of that principle contained in the case of *Ex parte Marier, In re Willis, Percival, & Co.* (4). It is quite true that the debts must be mutual debts, but before the Judicature Act it was impossible at Common Law to have regard to an equitable debt. The effect of the Judicature

(1) 6 Q. B. D. 540.
(2) 9 Ex. 153.
(3) [1892] 1 Q. B. 314; 61 L. J. (N. S.) Q. B. 463.
(4) 12 Ch. D. 491.

Appeal. (*S. I.*) 1922. LOUGHNAN *v.* O'SULLIVAN. Molony C.J.

Acts is to enable the Court to investigate the exact nature of the debt; and if it appears that while the judgment in form is a judgment in favour of A and B, still if it is shown that the entire beneficial interest in the judgment is vested in B, then you can set off that judgment against a sum of money due from B. In the case of *Ex parte Marier, In re Willis, Percival, & Co.* (1), to which I have referred, Lord Justice James says in the course of his judgment:—"Unless it could be made out clearly that A and B were trustees of the fund for A, it seems to me there could not be an equitable set-off, because the money is due in autre droit; and where the money is due in autre droit, the only exception which equity has introduced into the principle of a legal set-off is when the money is really and truly the property of one man in the name of another; not when the result of taking the accounts would be to show that the ultimate balance would be his property, but when it is nothing but what we used to call in the Privy Council a Bonamee account, that is, an account put by one man in the name of another merely for his own convenience." If it could be shown in the present case that while this judgment debt was in form a judgment for the Earl of Kenmare and O'Sullivan, it was in reality a judgment for O'Sullivan alone, then the case of *In re Willis, Percival, & Co.* (1) would apply. But no such case has been sought to be established.

It is also impossible to sustain as a valid set-off the sum mentioned in paragraph (*d*). There were proceedings brought in the Chancery Division in the matter of the Courts (Emergency Powers) Acts, 1914–1918, and in the matter of an intended action, in which Eugene O'Sullivan was plaintiff and John Maher Loughnan defendant. The proceedings were brought to enable O'Sullivan to realize the amount of the mortgage debts. Ultimately the Court gave him leave to proceed, and awarded costs to the amount of £57 6*s.* 7*d.* These costs were not made payable by anyone, but were made payable with the demand, that is to say, they are added to the demand; and until the demand is satisfied these costs do not come into existence as a present debt. The result is that the sums allowed to be set off by the Master of the Rolls all fail with the exception of that mentioned in paragraph (*a*), and we must discharge his order, except as regards the sum of £125. Accordingly the defendant is liable to pay a sum of £1,253 6*s.* 7*d.*, less £125.

As regards the costs, the plaintiff got his costs up to the time of the action, but by reason of these items of set-off, the Master of the Rolls did not allow costs of the account, and made each party abide his own costs. We will discharge that part of the order, and declare the plaintiff entitled to the costs of the action, the costs of the motion for set-off, and of this appeal.

(1) 12 Ch. D. 491.

RONAN L.J. :—

I am of the same opinion, and I only wish to add a few words as to the case of *Bourne* v. *Bennett and Others* (1), on which Mr. Conner relied. It was at first relied upon as a case on the equitable discretion of the Court of Chancery, and afterwards as a pure Common Law case. In that case the plaintiff obtained judgment against the defendant and other persons in an action of trespass, with £300 damages. If I get judgment against three persons in an action of trespass, I can levy that judgment against any one of them. The plaintiff obtained such a judgment against Bennett, one of the defendants; but he owed Bennett a separate debt of £700. Bennett was sole owner of that debt, which was due to him. Counsel for Bennett obtained a rule nisi on the part of Bennett to set off the £700 and costs due on the judgment confessed by the plaintiff, against the £300 and costs recovered by him in the action for trespass, which, as he urged, each of the defendants was liable to pay separately. The point made by the counsel who showed cause was that some arrangement ought to be made to indemnify the solicitors. In these circumstances the judgment debt due from Bennett was set off against a judgment debt due to Bennett from the plaintiff. The case is no authority whatever on the question now before us.

O'CONNOR L.J.—I agree.

Solicitors for the plaintiffs: *Philip W. Bass & Co.*
Solicitor for the defendants: *Maurice M'Cartie.*

H. J. M'C.

(1) 1 M. & P. 141; 4 Bing. 423.

M. R.
1922.

June 20.
July 18.

IN THE MATTER OF THE SOLICITORS' REMUNERATION ACT, 1881, AND THE LOCAL REGISTRATION OF TITLE (IRELAND) ACT, AND IN THE MATTER OF M. J. BYRNE, A SOLICITOR.

(1922. No. 182.)

Solicitor—Bill of Costs—Taxation—Sale of registered lands—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*Local Registration of Title* (*Ireland*) *Act*, 1891, *ss.* 25; 94, *sub-s.* 1; *s.* 95.

On 15th December, 1911, S. signed an undertaking for the purchase from the Land Commission of a parcel of land which was vested in S. on the 30th July, 1918, but S.'s title to which was not registered in the Land Registry until 27th October, 1920. S., in November, 1918, had instructed his solicitor B. to put up for sale his interest in the parcel and another portion of the lands, and they were ultimately sold by private treaty on 17th July, 1920, and the purchase completed on 31st October, 1920.

Held, that B.'s bill of costs should not be taxed under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), but under the rules and schedules prescribed under the Local Registration of Title Act, 1891 (54 & 55 Vict. c. 66), the taxing officer to be at liberty to allow for any extra work entailed by the delay in registering the vendor's title.

MOTION for directions as to taxation of costs.

The lands of Carrig Island, containing 239 acres and 4 perches, situate in the County of Kerry, were purchased by the Irish Land Commission as untenanted land for the purpose of resale in parcels. The lands were duly vested in the Land Commission, and their title thereto was registered in folio 6,648 in the County of Kerry on 23rd July, 1913. Subsequently the Land Commission sold part of said lands containing 26 acres to one John Carey, whose agreement to purchase is dated 19th December, 1911. The lands were vested in him in the year 1915. He subsequently sold to Mr. Charles F. Sandes before his title had been registered, and Mr. Charles Sandes was registered as owner of this parcel under the Local Registration of Title (Ireland) Act on 13th April, 1916.

On 15th December, 1911, Mr. Charles F. Sandes himself signed an undertaking for purchase of another part of Carrig Island, containing 88 acres, and this holding was duly vested in him on 30th July, 1918, but his title thereto was not registered in the Local Registration of Title office until 27th October, 1920, and the folio was not transmitted to the Local Registrar of Titles for the County of Kerry until the 13th November, 1920. Meanwhile, in the month of November, 1918, between the date of the vesting order and of the registration, Mr. Sandes instructed Mr. Byrne, solicitor, Listowel, to put up for sale by public auction his interest in both said parts of Carrig Island, and Mr. Byrne prepared advertisement for sale, conditions of sale, abstract of title, etc.; and these lands were in fact put up for sale by public auction on 28th December, 1918, but the bidding did not reach the reserve price, and the auction proved abortive. Subsequently—namely, on 12th day of July, 1920—the lands were sold by private treaty to one Garrett Dee on the terms of the former conditions of sale,

and the agreement for purchase, subjoined to the said conditions, was signed in Mr. Byrne's office. The purchase-money of both lots was £3,000. The purchase was completed on 31st October, 1920, when the purchase-money was paid over in Mr. Byrne's office, and Mr. Byrne presented a bill of costs to Mr. Charles F. Sandes as vendor's costs of sale. Mr. Byrne was himself absent from his office on the day when the purchase-money was paid over, and Mr. Sandes deferred the settlement of the costs until he had an opportunity of seeing Mr. Byrne personally, which he did the next day, and objected to being charged the costs of the abortive sale. Mr. Byrne agreed to strike out these costs, but Mr. Sandes subsequently contended that the costs should have been drawn according to the scale under the Local Registration of Title (Ireland) Act, and not according to the Solicitors' Remuneration Act. Mr. Byrne declined to accept this contention, and Mr. Sandes signed a requisition to tax the costs, including the costs of the abortive sale. The costs have been prepared and brought in for taxation under the Solicitors' Remuneration Act, and are opposed on behalf of Mr. Sandes by Mr. Boxwell, solicitor. The purchaser was represented during the sale proceedings by Mr. R. A. Macaulay, solicitor, and the form of transfer prepared by him followed the form given in Land Registry rules, with modifications by introduction of the words "beneficial owner," and also a clause with reference to right of way, subject to which the lands were sold. Mr. Macaulay retained the conveyance until the registration of the 88 acres had been completed in Mr. Sandes' name, and then filled in the blank for the folio number, and lodged his deed for registration.

Jellett K.C. (with him *B. Roche*), for Mr. Byrne:—

1. The Local Registration of Title Act does not authorize the framing of any scale of costs for work done outside the Land Registry, and relies on sect. 94, sub-s. 1; Order 12 of the orders and rules made under the said Act could not and does not apply to any proceedings outside the Land Registry; furthermore, schedules of costs framed under said Act and rules (Part III) could not and do not apply to any proceedings outside the Registry, and the regulations as regards costs in the same schedule, sects. 1, 2, 4, and 8, sub-s. 2, and all other (if any) rules and regulations purporting to fix costs for work done outside the Register are ultra vires. In this case the costs of the vendor all related to proceedings outside the Land Registry, and should be drawn according to the scale provided by the Solicitors' Remuneration Act, 1881, which is not repealed by the Local Registration of Title Act.

2. If, on the contrary, it be held that the Local Registration of Title rules do apply to drawing conditions of sale, abstracts of title, negotiations and other proceedings outside the Land Registry, and are intra vires, then we submit that they do not apply to the 88 acres of land purchased by Mr. Sandes himself, on the ground that at the time when the work was done by Mr. Byrne, Mr. Sandes was not the registered owner of these 88 acres, and that consequently the costs of preparing conditions of sale, abstract of title, negotiation, and other work in connexion with the sale by Mr. Byrne should be taxed under the Solicitors' Remuneration Act.

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In re BYRNE.

Sect. 94, sub-s. 11, of the Local Registration of Title Act applies both to costs and fees, but it could not be contended that the registration rules could provide for stamp duty on a deed. These duties are still regulated by the Stamp Acts.

The Solicitors' Remuneration Act has not been repealed; the costs of work for which it provides are subject to the provisions of that Act; and Mr. Byrne relies on the definition of a conveyance, Local Registration of Title Act, 1891, sect. 95, and the effect of a conveyance under the Local Registration of Title Act, sects. 25, 33, and 36.

If the Registrar of Titles is entitled to frame scales of fees for the costs of a conveyance, he would equally be entitled to provide for the costs of preparing a will and codicils and of obtaining probate thereof; also of all proceedings in the Irish Land Commission towards obtaining a vesting order which is ultimately to be registered; and he might also regulate the costs of marriage settlements dealing with registered land and other property, and with the passing of estate duty accounts for the purpose of clearing the Registry, dealing with applications under section 54 of the Irish Land Act, 1903, and obtaining consent of the Irish Land Commission thereunder.

In rule 4 of Order 12 the words "such proceedings" apply to the proceedings mentioned in rules 1 and 2—namely, proceedings in the Land Registry itself.

Under section 25 of the Local Registration of Title (Ireland) Act a conveyance is not effective until registered; the registration is for the purchaser to carry out, and the vendor had no control thereover; and the vendor's solicitor would therefore not be entitled to any costs at all, unless the purchaser choose to register his deed, as no sale would have been effected.

With regard to the expression "registered land," this relates to an estate in land, of which the vendor is registered as owner, and does not apply to the soil itself, which is vested in the Crown; and we rely on the fact that there is a leasehold register, and also that there are registrations subject to equities. Dealings with the reversion of the leasehold register would not be registered at all, and therefore in no way come under the purview of the Registration of Title Act. They are not dealings with registered land within the meaning of the Act. Similarly with regard to equities—these are outstanding estates, and until the equities are discharged the outstanding estates are not subject to the Local Registration of Title Act. They may involve searches in the Registry of Deeds, Judgments Office, and so on, and with regard to fees of such searches the rules under the Registration Act could not apply. The form of transfer shows that it relates only to lands having a folio number—i.e., already registered. The 88 acres of land had no such folio number, and were not already registered at the time when Mr. Byrne's work was completed. The form of transfer is a statutory form—sect. 35, sub-s. 2, and Order 4, rule 1.

The 88 acres was at the time of sale not a registered interest, and does not come under the heading to Part III of the Schedule of Costs.

James Henry, for Charles F. Sandes.

O'CONNOR M.R., having stated the facts as set out, proceeded:— *M. R.* 1922.

I think that this is a fair statement of the facts, subject to one qualification. *In re* BYRNE.

There was no abstract of title properly so called. There was no deduction of title through a succession of owners, which is the idea which an abstract of title conveys. In the case of the 88 acres there is merely a statement of the fiat of the Irish Land Commission which vested the estate in the vendor. In the case of the 26 acres there is merely a statement of the ownership of the vendor in fee-simple, as evidenced by the folio in the Local Registration of Title office. To call these abstracts of title would be a misnomer.

There was no deduction of title such as is contemplated by the scale of charges fixed by Schedule 1, Part I, to the general order made under the Solicitors' Remuneration Act, and, in my opinion, that scale does not apply. It is well settled that the schedule applies only to cases in which substantially all the work for which the percentage is chargeable is done: *In re Lacy* (1).

The vendor's solicitor was of opinion that the case did come within the schedule, and in the bill of costs furnished to his client the vendor the first item is £75, the amount of the percentage on the purchase-money which would be payable if the scale applied. In my opinion he is not entitled to this. This is really the whole matter in contention.

On the other hand, the vendor contends that the bill is taxable under the rules made under the Local Registration of Title Act, inasmuch as the land was registered land under that Act. It is admitted that this was the case so far as the 26 acres was concerned, because the vendor's title was registered long before the sale; but it is contended that as the vendor was not at the time the registered owner of the 88 acres, this part was not registered land.

But the vendor derived his title directly from the Irish Land Commission, whose title had been registered. In my opinion, once land has been registered, it becomes and remains registered land within the meaning of the Local Registration of Title Act until the register is closed. The framers of the Act recognized that once land was registered the showing of title became a simple matter, and that consequently the prevailing scale of charges prescribed for fixing remuneration for making title ought no longer to apply, and that a new scale should be adopted. In the vast majority of cases the proof of title means nothing more than the production of a land certificate or the folio showing the ownership. No doubt in some cases, owing to the neglect of the vendor to get himself registered or some other cause, the folio may not have been written up to date, and the vendor's solicitor may have been put to some extra work; but the scale of costs and fees provides for such extra work, and the taxing officer may allow proper fees for such, because the scale does not include it (see rule 9 of the scale of fees). In the present case some extra work appears to have been entailed by the delay in registering the vendor's title.

(1) 25 Ch. D. 310.

M. R. 1922.

In re Byrne.

My ruling must be that the bill should not be taxed under the Solicitors' Remuneration Act, but under the rules and schedules prescribed under the Local Registration of Title Act, the taxing officer to be at liberty to allow for any extra work entailed by the delay in registering the vendor's title.

A point was made that the rules were ultra vires. I understood that that point was not persisted in. I may say, however, that it was absolutely untenable, because, by sect. 94, sub-s. 3, the rules having been laid before Parliament must be deemed to have been duly made, and to be within the powers of the Act.

Solicitor for the applicant: *M. J. Byrne.*
Solicitors for J. C. Sandes: *Brownrigg & Boxwell.*

R. R.

IN RE JERMINGHAM TRUSTS. GORMANSTOWN AND ANOTHER *v.* NICHOLL AND OTHERS.

(1922. No. 367.)

M. R.
1922.
July 26, 27, 31.

Will—Revocation—Devise to grandson for life and his children in tail male—Revocation by codicil of gift to grandson—Effect on children's interest.

Testatrix by her will devised her freehold lands upon trust to the use of her daughter A. M. C. for life, and after her death upon trust to the use of her grandson I. N. for life, with remainder to the use of his first and other sons in tail male, and in default of such issue to the use of her grandson G. S. C. for life, with remainder to the use of his first and other sons in tail male, and in default of such issue to the use of her grandson B. M. for his life, with remainder to his first and other sons in tail male.

By a codicil the testatrix revoked the clauses, limitations, and provisions contained in her will so far as related to I. N. and G. S. C. (the latter being dead), and directed and declared that her will should be read and construed as if the names of I. N. and G. S. C. had been omitted therefrom, but that in lieu of any interest or share which I. N. would have taken under will if the codicil had not been made, she directed that her trustees should pay to I. N. after her death the annual sum of £100 out of the income of her estates during his life.

Held, that the revocation by codicil had the effect of revoking the gift of the estate tail to the issue of I. N.

ORIGINATING SUMMONS for the determination of questions arising on the construction of the will and codicil of Sophia Mary Jermingham.

By her will, dated February 11th, 1896, testatrix devised her mansion-house, Harbourstown, and all her freehold lands, situate in counties Meath, Dublin, Sligo, and Roscommon, or elsewhere, upon trust to the use of her daughter, Agnes Mary Carey, for life, charged with the payment of an annuity of £200 to her grandson Iltyd Nicholl, and after the death of her daughter upon trust to her said grandson for life, with remainder to the use of his first and other sons in tail male, and in default of such issue, upon trust to the use of the testatrix's grandson George Stanley Carey, for life, with remainder to the use of his first and other sons in tail male, and in default of such issue, upon trust to the use of testatrix's grandson Bernard Nicholl, for his life, with remainder to the use of his first and other sons in tail male.

By a codicil, dated September 20th, 1899, she declared: "I revoke the clauses, directions, limitations, and provisions contained in my said will so far as relate to the said Iltyd Nicholl and George Stanley Carey (he being now dead), and direct and declare that my said will shall be read and construed as if the names of the said Iltyd Nicholl and George Stanley Carey had been omitted therefrom, but in lieu of the share and interest which the said Iltyd Nicholl would have taken under my said will if this codicil had not been made, I direct that my trustees shall pay after my decease to my said grandson Iltyd Nicholl, the annual sum of £100 out of the income of my estates during his life, and in the happening of the said events I direct that

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GORMANSTOWN v. NICHOLL.

the whole of the interest of the said Iltyd under my said will and this my codicil shall go and be disposed of as if the said Iltyd Nicholl were dead, it having come to my knowledge that my said grandson Iltyd Nicholl had borrowed certain sums of money from my said granddaughters Pauline Nicholl and Katherine Nicholl, amounting to the sum of £300. And I also direct that in default of issue by my said grandson Bernard Nicholl, my trustees shall hold my estate upon trust to the use of my grandson Francis Stanley Carey, for his life, with remainder to the use of his first and every other son successively according to seniority in tail male, and after failure or determination of the uses and estates limited by my said will and this codicil thereto, I declare that my said estates shall be held upon the trust contained in my said will respecting the same. In other respects I ratify and confirm my said will."

Herbert Wilson K.C., for the plaintiffs (the trustees).

Lavery, for the defendant Iltyd Andrew Nicholl:—

The codicil only revoked the gifts in the will made to Iltyd Nicholl, leaving the gifts to his children unaffected, except that they were accelerated by the revocation of the gifts in favour of their father: *Whitehorne* v. *Best* (1).

S. L. Brown K.C. (with him *Poole*), for the defendant Robert Arthur Francis Nicholl.

O'CONNOR M.R., having stated the facts as above, proceeded:—

The events which happened are these—George Stanley Carey, the third tenant for life mentioned in the will, died on the 4th April, 1896, without issue. His death is mentioned in the codicil. Agnes Mary Stanley Carey, the first tenant for life, survived the testator, on whose death she went into possession of the lands, and so remained until her death, which occurred on the 16th July, 1921.

Iltyd Nicholl, the second tenant for life under the will, survived the testatrix, but died, in the lifetime of Agnes Mary Stanley Carey, on the 9th October, 1914. He had married and left him surviving two sons, who are still living, and are under the age of twenty-one years. The eldest of these is Iltyd Andrew Antonius Lawrence Nicholl, the first-named defendant in the summons. His younger brother Paul has not been made a party to the proceeding.

Bernard Nicholl, the fourth tenant for life named in the will, survived the testatrix, but died on the 9th October, 1914, in the lifetime of Agnes Mary Stanley Carey. He left issue, and the defendant Robert Arthur Francis Nicholl is his eldest son.

During the lifetime of Agnes Mary Stanley Carey parts of the lands devised by the will were sold under the Land Acts, and the proceeds of the sale were invested in and are now represented by £7,799 19*s.* War Loan 5 per cent. Stock, which stands in the joint names of the trustees of the will, who are trustees thereof for the purposes of the Settled Land Acts. They are the plaintiffs in the

(1) [1906] 2 Ch. 121.

matter. The defendant Robert Arthur Francis Nicholl, conceiving that under the will and codicil he was tenant in tail of the lands and stock immediately expectant on the life estate of Agnes Mary Stanley Carey, mortgaged his estate in remainder by indenture dated the 17th September, 1920, to John Abercrombie Holdsworth to secure the sum of £820. This indenture was enrolled as a disentailing assurance, but created only a base fee, as it was executed in the lifetime of Agnes Mary Stanley Carey. After her death the base fee was enlarged into a fee-simple by indenture dated 16th September, 1921.

On the death of Agnes Mary Stanley Carey the defendant Robert Arthur Francis Nicholl entered into possession of the lands and receipt of the rents and profits thereof, and is still in possession.

The defendant Iltyd Andrew was at the death of Agnes Mary Stanley Carey and still is resident in Australia with his mother. Owing to his absence and his infancy, his right, if any, was not asserted on the death of the tenant for life, and the title of Robert Arthur would have remained unchallenged were it not that the fund which was in the hands of the trustees had to be dealt with. The defendant Robert Arthur called upon the trustees to transfer this fund to him as absolute owner in the events which had happened. The trustees were advised that they could not safely do so without getting the opinion of the Court, and hence the present summons.

The question at issue arises on the codicil. Had it the effect not merely of revoking the devise of the life estate given by the will to the testatrix's grandson Iltyd, but also of revoking the gift to his issue of the estate in tail next in remainder? His eldest son is the first-named defendant. He is an infant, and has appeared by his guardian ad litem. It is contended for him that the codicil only revoked the devise of the estate for life given to his father, and did not revoke the devise in tail male to his first and other sons, and that he became entitled thereto in possession on the death of Agnes Mary Stanley Carey, the effect of the codicil having been to accelerate his estate tail. This is purely a question of construction, and in approaching it I am fully impressed by the principle insisted, and properly insisted, upon by Mr. Lavery, counsel for the infant, that when there is a clear gift by a will it must remain unless it is clearly revoked by a codicil. In other words, the Court must be satisfied that the testator or testatrix intended to revoke and did in fact revoke the gift given by the will. Let us see then what the will and codicil did. The will gave the lands to Iltyd Nicholl (the grandson) for his life, with remainder to his first and other sons in tail male. The codicil revokes the clauses, directions, limitations, and provisions contained in the will so far as relates to the said Iltyd Nicholl and George Stanley Carey (he being then dead), and directs and declares that the will shall be read and construed as if the names of Iltyd Nicholl and George Stanley Carey had been omitted therefrom; but in lieu of the share and interest which the said Iltyd Nicholl would have taken under the will if the codicil had not been made, she directed that the trustees should pay after her decease to her grandson Iltyd Nicholl the annual sum of £100 out of the income of her estates during his life. Now, on the first reading of this clause there seems to be nothing that would justify its application to more than the life estate of Iltyd Nicholl, although,

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no doubt, the words "clauses, directions, limitations, and provisions" are more than sufficient for reference to a mere life estate. But in a close reading, I think that the words must be held to refer to more than the life estate. They are to be construed with reference not merely to Iltyd Nicholl, but also to George Stanley Carey. Now, he had died without issue before the codicil was made, so that he and his issue were in effect struck out of the will. Therefore, when the testatrix revoked her will, so far as he was concerned, she must have intended to revoke the limitation to his issue as well as the life estate. It was unnecessary for her to do either, but having proceeded to make the revocation she must be taken to have intended that the whole line of limitations, so far as George Stanley Carey and his male issue were concerned, should be obliterated. If that is the construction, so far as relates to the George Stanley Carey line, must not a like construction be applied to the Iltyd Nicholl line? I think that this follows of necessity, because the names of both Iltyd Nicholl and George Stanley Carey are dealt with together in one clause. But there is more than this in the codicil to help the construction. If the codicil had the effect of striking out from the will the estate in tail limited to the issue of Iltyd Nicholl, the only other estate tail which could arise under the will would be in the issue of Bernard, and any remainder over on cesser of that estate tail would be in default of the issue of Bernard irrespective of any other issue. It is then strongly confirmatory of the construction of the codicil that we find at the end thereof a further limitation in default of issue by Bernard in favour of Francis Stanley Carey for life, with remainder to his sons in tail. If the issue of the testatrix's grandson Iltyd had any interest, the limitation ought to have been "in default of and subject to the limitations aforesaid," and not merely in default of issue of Bernard. No doubt, in an unbroken series of limitations the words "in default of issue" or "such issue" are aptly used when it is intended to create a further remainder on determination of all prior estates; but here we have in the codicil a further remainder given by a different instrument from that in which the prior series of limitations is given, instead of a continuous series of limitations in one sentence. However, I only dwell upon this as confirmation of the construction which, independently of it, the clause of revocation in my opinion bears.

During the argument my attention was directed to the clause in the codicil which directs that on the happening of certain events the whole of the interest of the said Iltyd Nicholl (the grandson) should go and be disposed of as if the said Iltyd Nicholl were then dead. It occurred to me at the time that this direction favoured the view that the estate in tail male given to his sons by the will was accelerated and not destroyed; but on reading the clause in connexion with what goes before, it appears that it referred only to the cesser of the annuity of £100 bequeathed by the codicil to Iltyd Nicholl for his life or until bankruptcy or alienation. These are the only events provided for, and they only affected the annuity.

So far I have not referred to any authority, because the case is purely one of construction, and I think that the best way of getting at the meaning of a document is from the document itself; and if it can be interpreted without reference to what was decided on other wills, it should be so construed.

Of course a rule of law, as distinguished from a rule of construction, must be obeyed, and I have been pressed by the rule that the revocation of the gift of a life estate does not destroy the estate tail given next in remainder to the issue of the tenant for life, but accelerates it. I fully accept this rule; but before it is applied it must first be established that it was only the gift of the life estate which the testator or testatrix intended to revoke. In this case I think that the testatrix intended to revoke both the estate for life and estate tail next in remainder.

In re Whitehorne, Whitehorne v. *Best* (1), was strongly pressed on me by Mr. Lavery as an authority on a will almost precisely similar to the will now before me. There there was a revocation of the life estate, and the will declared that the direction and trusts thereof should be carried out as if the name of the tenant for life had never appeared therein. It was held that the estate in remainder was not destroyed. But the case turned on the intention as expressed by the will, and it was clear that there was no intention to revoke the estate in remainder. I cannot follow it, because I am of opinion that in the present case the testatrix did intend to destroy the estate in remainder. This was the sole question raised by the summons, and I answer the question put by declaring—

1. That the defendant Iltyd Andrew Antonius Lawrence Nicholl did not take any estate or interest in the lands mentioned in the said will and codicil or the investments representing the same.

2. That the defendant Robert Arthur Antonius Lawrence Nicholl in the events which happened took an estate tail in possession in the said lands under the said will and codicil immediately on the death of Agnes Mary Stanley Carey, deceased.

Solicitors for plaintiffs: *Montgomery & Chaytor.*
Solicitors for defendant Iltyd Andrew Nicholl: *Corrigan & Corrigan.*
Solicitors for defendant Robert Andrew Nicholl: *Montgomery & Chaytor.*

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(1) [1906] 2 Ch. 121.

Appeal. (*S. I.*) 1922.

July 19, 22.

In the MATTER of the ESTATE of THOMAS PRITTIE COSBY.

(E. C. 6286.)

Will—Construction—Gift to one for life, and after his death "to his eldest legitimate male issue"—Gift over in default—Persona designata or nomen collectivum.

A testator left property (including realty) to his son W. for life, and after his death to his eldest legitimate male issue, in default of which to the eldest male issue of testator's late brother S., in default of which to the eldest male issue of his late sister R., on failure of her male issue to the eldest male issue of his late sister H., followed by directions as to jointuring, charging, etc., to whomsoever should possess the T. and S. estates. No disentailing deed was ever executed.

Held, affirming the judgment of Wylie J. (ante, p. 54) (Molony C.J. dissentiente), that the phrase "eldest male issue" was a nomen collectivum, and not the description of a persona designata, and that the person entitled under the limitations in the will took as tenant in tail male.

Sheridan v. *O'Reilly*, [1900] 1 I. R. 386, discussed.

Per Ronan L.J. and Dodd J.: The lands in *Lovelace* v. *Lovelace* (Cro. Eliz. 40) being gavelkind, the case is no authority in the case of freeholds.

The facts, arguments of counsel, and authorities cited are set out in [1922] 1 I. R., at pp. 54-57.

Jellett K.C. and *Walker*, for Mrs. Anne Houldsworth Cosby, as universal legatee and devisee of the late vendor.

Garrett Walker K.C. and *Longfield*, for Dudley A. S. Cosby.

Cur. adv. vult.

Molony C.J.:—

I have the misfortune to differ from both my colleagues. My judgment, therefore, will not affect the result of the appeal.

Thomas Phillips Cosby executed his will on the 21st August, 1846, the portion of which we have to consider being as follows:—

> "I now leave and bequeath to my brother William Cosby for his life all and any estates or money I have the right or power of leaving him (but subject to the conditions and following legacies or annuities I shall name in this will), after his death to descend to his eldest legitimate male issue, in default of which to the eldest male issue of my late brother Sydney Cosby, in default of which to the eldest male issue of my late sister Fanny, wife of Horace Rochfort, Esq., of Clogrenane, in failure of her male issue to the eldest male issue of my late sister Harriett, wife of Frederick Lord Ashtown."

The testator died in 1850, and thereupon William Cosby entered into possession of the estate, which consisted of, amongst other things, the lands the subject of the pending sale in the Land Commission. He died in 1872, and thereupon his eldest son, Thomas Prittie Cosby, entered into possession of the lands, and remained in possession until his death in 1912, without issue. The question to be determined in

the present case is whether, under the limitations of the will of Thomas Phillips Cosby, Thomas Prittie Cosby took an estate in tail male or an estate in fee in the lands?

The case came before Mr. Justice Wylie, who held that Thomas Prittie Cosby only took an estate in tail, and this appeal has been brought from that decision by Mrs. Anne Houldsworth Cosby, the universal devisee and legatee under the will of the said Thomas Prittie Cosby.

On the part of the appellant, Mr. Jellett K.C. has contended that Thomas Prittie Cosby took an estate in fee-simple, relying mainly on the old case of *Lovelace* v. *Lovelace* (1), which was considered by the Master of the Rolls and the Court of Appeal in Ireland in the case of *Sheridan* v. *O'Reilly* (2). The report in *Lovelace's Case* (1) is certainly short, but none the less clear. It is as follows:—"Waste. The case was, J.S. being seised in fee of land devised it to J.D. and to his eldest issue male (he having no son at the time); it was adjudged no estate tail, but for life only, and if he then had a son it was all one; but a devise to one and his issue male is an estate tail, but here the word 'eldest' will not permit that construction."

This case gives an importance to the word "eldest" which has been recognized in subsequent cases. It is to be observed that in the *Lovelace Case* (1) it was not expressly stated that J.D. was to take for his life, but it is made perfectly clear in the present will, as also in the will in *Sheridan* v. *O'Reilly* (2), that the first taker in each case only got a life estate.

In *Sheridan* v. *O'Reilly* (2) the testator bequeathed his property to trustees upon trust that the rents and profits should be divided into five equal parts, to be paid half-yearly to each of his five nephews, share and share alike, "to be by them enjoyed during the period of their natural lives, and after the decease of each to their eldest male issue, respectively, of each, and in default of such male issue such share to revert to the remaining legatees or their eldest male issue, to be divided equally every half-yearly term among them." It was held by Porter M.R. that the phrase "eldest male issue" was a description of a persona designata, and was not a word of limitation. He said (page 391):—"Now, apart from rules of tenure and the cases, no intelligent reader, ignorant of *Roddy* v. *Fitzgerald* (3), could hesitate for one moment in arriving at the conclusion that the nephews were to have life interests only, the property passing over to the eldest son or other male descendant then living of each. 'Eldest male issue' is a peculiar phrase, not occurring, so far as I can find, in any other case except *Lovelace* v. *Lovelace* (1), to which I shall presently refer. 'Eldest' naturally implies a comparison of ages as between different persons, and is at least prima facie referable to a person, and not to a line of descent. Where the words 'heir male' or 'heir male of the body' occur in such a way as to show that they are used in their proper and legal sense as words of limitation and not of purchase, the addition of such a qualification as is contained in 'first,' 'next,' and the like will probably not alter the meaning, for these latter words can then only refer to the line of descent."

The decision of the Master of the Rolls on this point was not

(1) Cro. Eliz. 40. (2) [1900] 1 I. R. 386. (3) 6 H. L. Cases, 823.

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questioned in the Court of Appeal, although an appeal was taken upon other points. Walker L.J. (with whom Lord Ashbourne agreed) thus stated the effect of the decision of the Master of the Rolls:—"The decision of the Master of the Rolls on the main question involved in that branch of the will which introduces the question involved in the appeal is, I think, perfectly right, and in fact has not been questioned. A devise to a person for life, and after his decease to his issue or male issue, would clearly confer an estate tail, and it is now settled that a gift of personalty to a person for life, and after his decease to his issue, would be a gift for life with remainder to his children as a class as purchasers, but the use of the word 'eldest' in the gift makes it impossible to apply either of these constructions; and therefore I think the Master of the Rolls rightly held that the gift was in each case to the eldest son as persona designata." Holmes L.J. says (at page 400):—"The Master of the Rolls discussed very fully the meaning of the words 'eldest male issue,' and he came to the conclusion that they do not indicate a line of descent, but point to an individual—persona designata—who is to take as purchaser. The appellant accepts this portion of his judgment, and the respondent does not challenge it. The reasoning seems to me to be conclusive."

Finlay's Estate (1) has been relied upon for the purpose of showing that in the present case all Thomas Prittie Cosby got was an estate tail; but the words of the will in *Finlay's Case* (1) were essentially different, and these differences were pointed out by Mr. Justice J. O. Wylie in his judgment. In that case a testator devised fee-simple lands to trustees "for the use of my grandson G. and his lawful eldest male issue . . . and in default of male issue of the G. and not attaining lawful age, in that case then to go to my grandsons D. and H. in equal divisions and their lawful heirs." J. O. Wylie J. in that case was faced with the decision in *Sheridan* v. *O'Reilly* (2), and he distinguished it on three grounds, which he states at p. 149:—"This case again differs in several material respects from the present case. There the gifts to the nephews were expressly limited 'to be by them enjoyed during the period of their natural lives, and after the decease of each, to their eldest male issue.' Here, it is simply to George Finlay and his lawful male issue. There, the devise over was in default of such male issue. Here, it is in default of male issue of George attaining twenty-one. There, it was a gift of mixed property, the greater part of which was personalty.

The three grounds upon which Wylie J. distinguished *Sheridan* v. *O'Reilly* (2) are all to be found in the present case just as well as in *Sheridan* v. *O'Reilly* (2). There is, in the first instance, an express gift for life, which was not in *Finlay's Estate* (1). There is, secondly, a devise over, not in default of male issue merely, but specifically "in default of which," following the words "eldest legitimate male issue," which must have exactly the same meaning as "in default of such male issue"; and, thirdly, a blended fund of realty and personalty.

Two other cases have been relied on on behalf of the respondents, namely, *Doe* v. *Garrod* (3) and *Lewis* v. *Puxley* (4). As regards

(1) [1913] 1 I. R. 143.
(2) [1900] 1 I. R. 386.
(3) 2 B. & Ad. 87.
(4) 16 M. & W. 1733.

Garrod's Case (1), it is clearly distinguishable for the reasons mentioned by the Master of the Rolls in *Sheridan* v. *O'Reilly* (2), and I agree with his conclusion that he is not able to see that that case may not stand together with *Lovelace* v. *Lovelace* (3).

In *Lewis* v. *Puxley* (4), what the testator really meant was abundantly clear from the context when he used the words "eldest legitimate son," and the effect of the context is thus stated by Pollock C.B. in his judgment:—"There is no reason to doubt that the testator by the words 'eldest legitimate son' meant the same thing as if he had said, 'I give the estate to my son John for life and to his issue male after his death,' that being the expression which he uses with reference to Richard. If he had done so, there could have been no doubt that John would have taken an estate tail."

The case just referred to, which depends upon its own particular words, is of no assistance in the present case. Wylie J., in his judgment, admits that this case is similar to *Sheridan* v. *O'Reilly* (2) on the points (*a*) that it is a mixed fund and (*b*) that it is a case of an appointment of an estate for life with a gift over; but he says it is distinguishable upon the grounds (*a*) that the testator created limitation after limitation, and (*b*) has added clauses, especially those relating to charging and jointuring, which are wholly inconsistent with an estate in fee. As regards (*a*), I do not think that the will creates limitation after limitation. It was competent for the testator to provide that if William Cosby never had any legitimate male issue, then upon the cesser of his life estate the eldest male issue of some other person should succeed to the entire property. As regards the power of charging and jointuring, it is not stated in the will by whom these powers are to be exercised, and they are perfectly proper provisions to insert in reference to the first tenant for life, and can be considered as referring only to him.

On the whole case I have come to the conclusion that Thomas Prittie Cosby took an estate in fee, and that consequently the order of Wylie J. ought to be reversed.

RONAN L.J.:—

I have had an opportunity of reading the judgment about to be delivered by Mr. Justice Dodd, and as my judgment is really supplementary to his, I think it would be well if my colleague delivered judgment first.

DODD J.:—

I had hoped that my judgment would be simply in the words "I concur"; but since the two other members of the Court differ in opinion, it becomes necessary for me to give my reasons for my decision.

I think all the cases cited can stand, and I think the principles of construction applicable to this will can be stated in such a manner as to avoid controversy.

(1) 2 B. & Ad. 87.
(2) [1900] 1 I. R. 386.
(3) Cro. Eliz. 40.
(4) 13 M. & W. 1733.

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I confess to a feeling in favour of the first and second editions of a text-writer when the matter has come from an individual mind, and before interpolations are added from recent decisions supposed to qualify the author's meaning. The first edition of Jarman was in 1843; the second edition was by Wolstenholme and Vincent in 1855. It was printed in such a form that "the reader would still recognize at a glance those parts which carry the authority of the original writer." In both the principle is laid down as follows; I quote from the second edition, vol. ii, p. 279:—"With respect to the limitation to the heirs of the body, it is (as before suggested) immaterial whether they are described under that or any other denomination, since it is clear that in every case in which the word "issue" or "son" is construed to be a word of limitation, and follows a devise to the parent for life, or for any other estate of freehold, such parent becomes tenant in tail by force of the rule in *Shelley's Case* (1). The words in question are read as synonymous with heirs of the body, and consequently the effect is the same as if those words had been actually used. Upon the same principle in the converse case, i.e., where the words 'heirs of the body' are explained to mean some other class of persons, the rule does not apply."

Jarman says his first publication on the subject dated back seventeen years before 1843. The author, referring to *Lovelace* v. *Lovelace* (2), says: "It is extremely probable that a devise to A and his next male issue would be held to give an estate in tail male, though the contrary was decided in *Lovelace* v. *Lovelace*" (2).

It is because of the way the Master of the Rolls (Sir Andrew Porter) dealt with this statement that the main controversy here has arisen.

Sir Andrew attributes it to the editor of the then current edition of Jarman. As I have shown, it dates further back. The authorities cited by the Master of the Rolls were not authorities cited in argument, but were the result of his own research. In *Garrod's Case* (3), which he distinguishes, the words were, "to the eldest son of my nephew J.G." Preston, for the plaintiff, in arguing that case cited numerous authorities: *Poe* v. *Halley* (4); *Sonday's Case* (5); *Bifield's Case* (6); *Robinson* v. *Robinson* (7); *Mellish* v. *Mellish* (8), where all the authorities are collected. Preston's argument was: "It will be contended perhaps that by the words of the codicil the eldest son took the fee. But the words 'eldest son' in this case appear from the subsequent words to be used as denoting, not an individual, but a class": *Doe* v. *Garrod* (3). *Lovelace* v. *Lovelace* (2) was cited against him, and in his reply he said: "*Lovelace's Case* (2), if it had occurred at the present day, would have been decided otherwise," p. 94. He had some support for his statement (see Bayley J.'s observation in *Mellish* v. *Mellish* (8), cited by him). This is only a statement made by counsel in argument, but that counsel was a great authority in his day on real property law. The statement in the first edition of Jarman was made only by a text-writer, but that text-writer was Jarman. The editors of the second edition took Jarman's sentence, which appeared in a foot-note, and

(1) Moore's Repts. 136 & 1 Repts. 93*b*.
(2) Cro. Eliz. 40.
(3) 2 B. & Ad. 87.
(4) 8 T. R. 5.
(5) 9 Ref. 127.
(6) 9 Ref. 127.
(7) 1 Burr. 38.
(8) 2 B. & C. 250.

put it into the text, and one of those editors was Wolstenholme. Porter M.R. had not the history of the case before him.

I have diligently gone through Cruise's Digest, and such other books as occurred to me that were conversant with such matters, to see if *Lovelace* v. *Lovelace* (1) had ever been cited or acted upon with approval by any Judge. I cannot find a trace of it. It was cited in the two cases I have mentioned, but not with approval. *Lovelace's Case* (1) is reported in "Cro. Elizabeth." This was the latest of Croke's reports. The cases reported extend back sixty years. The report of *Lovelace* v. *Lovelace* (1), decided in 1584, did not appear till 1660. The notes could not have been taken by the Chief Justice in person. Some of the reports are of great value, but as a whole they have not been favourably regarded. "Wherever Croke professes to report a case, and reports it fully, his authority is of the best kind. But as a general rule his cases are too shortly reported to be satisfactory" (Wallace's Reporters). Moreover, the reports were posthumous, and were translations from an unpublished and not very legible French original. It would seem then that a book of that kind was of small authority. A distinguished American Judge has described it as "a book in which may be found precedents for almost any opinion." A Judge might be pardoned if he accepted the opinion of Jarman and Wolstenholme and Preston in preference to a judgment so reported.

Croke's report is as follows:—

"27 Eliz. (In the Common Pleas)—Sir Edmund Anderson C.J.

"*Waste*:—

"The case was J. S., being seised in fee of land, devised it to J. D. and to his *eldest* issue male (he having no son at the time). It was adjudged no estate tail, but for life only; and if he then had a son it was all one; but a devise to one and his issue male is an estate tail; but here the word 'eldest' will not permit that construction."

What is the judgment? "Here the word 'eldest' will not permit that construction." That is the entire judgment. Is it to be taken as deciding that the words "his eldest issue male" cannot be equivalent to "heirs male of his body," and cannot be words of limitation? If so, in my opinion, it is not law. Or is it a decision on the facts of the particular case? We do not know anything of these facts. It is not necessary to say it is bad law. There is not enough of it to say whether it is or not. I think it reasonably clear that Jarman, Preston, and Wolstenholme, so far from thinking it impossible that these words should create an estate tail, were of opinion that prima facie the words would create such an estate unless controlled by something else in the devise.

I had got so far in my investigation when further research disclosed that there actually did exist another reference to *Lovelace* v. *Lovelace* (1). It appears in the report of *Perrott's Case* (2), which is reported in

(1) Cro. Eliz. 40. (2) Moore's Repts. 371.

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the Cases Collected and Reported by Sir Francis Moore. The report is in Court Latin and French, and at p. 371 of the second edition of Moore's collection we read as follows:—

"Un cas report per Justice Windham en le Comon Bank en 26 & 27 Eliz. Reginae rot. 343 ou 323 et adjudge Trin. 27 Eliz. en accon de wast Leonard Lovelace vers Thos. Lovelace lou appiert que la terre esteant gavelkinde fuit devise al un et *seniori exitui masculo suo* et sic de heire male al heire male a touts jours; et fuit adjudge que ceo fuit estate de franktenement en rem a touts les heires males queux seront nees et en esse durant le continuance del ticular estate en possession et a nient plufois; et issint l'accon de wast maintainable."

From this it appears clear that the estate was not one in fee-simple, as Croke's report states, but in gavelkind; if "here" in Croke's report means in gavelkind, the decision may have been sound enough. I will cite an extract from Cruise's Digest—Title xxxviii—Devise—ch. xiv:—

"In a case cited by Mr. Robinson in his Custom of Gavelkind there was a devise to Sergeant Millar and his wife for their lives, remainder to the next heir male of their two bodies. It was held that this was a devise in tail, for a devise to the heir male was a devise in tail, unless there were words of limitation superadded. But the words 'first,' 'next,' or 'eldest,' or any like words superadded made no difference."

Lord Parker has said that a Judge in applying a doctrine of law should bring to his aid an intelligent knowledge of the history of the law. Ronan L.J. has followed that course. He has read to me the notes of his research; and his history of judicial decision as to the word "issue" is so eminently satisfactory that all I can do is to accept it with thanks and admiration. I propose to follow the history down another by-path. We shall meet on the main road.

Edward Shelley being seised in tail general, had two sons, Henry and Richard. Henry died leaving a widow enceinte. Edward suffered a recovery to the use of himself for life, remainder to the use of the heirs male of his body, and the heirs male of such heirs male, and died before his daughter-in-law was delivered. Richard as the only heir male in esse entered. The widow then gave birth to a son; and the question was whether he had a right to the estate rather than Richard the uncle. The point, therefore, was whether Richard on the uses of the recovery took by purchase or by descent. It was argued, says Moore (who has written a report of it) sovent fois al barre. Coke names five counsel who were with him. He was for the widow's son; Anderson, Queen's Serjeant, was for the plaintiff. The Queen's Bench, where the case arose, was unable to form any judgment. At last the Queen ordered her Chancellor to have it determined. The Chancellor decided for Coke. The Judges all apparently concurred, and judgment was entered for the defendant. The date is important. It was 23 Eliz.—that is, 1581. Anderson was shortly afterwards made Chief Justice of the Common Bench, and it was in his Court that

Lovelace v. *Lovelace* (1) was decided in 1584. Coke's report of *Shelley's Case* (2) did not come out till 1600. When it did come out Anderson challenged it. In his own report of the case he gives somewhat fully his own argument for the plaintiff, and concludes: "Notwithwithstanding which, judgment was given for the defendant . . . but the reason was not published by the Court." He adds: "Nota—Le Atturney Mastir Cooke, ad ore fait report en print de cett case que argumentes et les agreements del Chanceler et auters judges mes rien de c̃ fuit parle en le Court ne la monstre." But nothing of this was said in Court, nor there declared!

But it did not end there. Bacon and Anderson brought it, among other charges, against Coke, that he reported his own views as the views of the Court. They relied on two cases: this one of *Shelley* (2), argued by Anderson, and *Chudleigh's Case* (3), argued by Bacon. James and his Privy Council adjudged Coke guilty. He was not included in the Commission of Assize then going out, and he was deprived of his Chief Justiceship. This was in 1616. It may be, as Lord Campbell and Hallam point out, that Coke's real offence was that he alone among the Judges had declined to say what he would do if the King ordered the Court not to proceed to judgment in a case in their Court till the Royal pleasure were known. But as to the authority of the decision, the facts are important. Assume that the decision of Anderson is to be taken as rightly reported by Coke, and that it was a decision that the words in *Lovelace's Case* (1) were not, and could not be, words of limitation. After the review of Lord Justice Ronan, what possible authority can it have? It was in conflict with *Shelley's Case* (2), and was Anderson's view as against Coke's. Coke's has prevailed, but not quite without question.

Lord Mansfield, a century later, in *Perrin* v. *Blake* (4), carrying with him his three puisnes, as was his wont, sought to free wills from the rule. But in the Exchequer Chamber he was overruled by seven Judges to one, and the true doctrine respecting the application of the rule laid down, the Court adopting Sir William Blackstone's argument.

Here my by-path brings me into touch with the Lord Justice. The word "issue" was not the subject of express decision; but it appears from Moore's Reports it received consideration, the Statute de donis and the meaning of "issue in tail" being dwelt upon. Though there is no judicial decision, it follows almost as a corollary that "issue," I will not say must be, but may be, a word of limitation.

It is strongly urged upon us that the present case is ruled by the decision in *Sheridan* v. *O'Reilly* (5). No two wills could be more dissimilar. The testator in the one had no family, large sums of money, a small farm in fee—some forty acres—five nephews. He commenced by dividing all his income into fifths, and gave a fifth to each nephew, and after the death of each to their eldest male issue, with other provisions.

(1) Cro. Eliz. 40.
(2) Moore's Repts. 136 & 1 Repts. 93*b*.
(3) 1 Repts. 113*b*.
(4) 4 Burr. 2579; Bl. Rep. 672.
(5) [1900] 1 I. R. 386.

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In that case the Master of the Rolls decided that the eldest son took as a persona designata. It was quite unnecessary for him to decide that in no case could "eldest male issue" be words of limitation. It did not need the resurrection of *Lovelace's Case* (1). There were cogent coercive reasons given by the Master of the Rolls himself for holding that there was a direct gift to the eldest son of each nephew. Was the testator going to create five estates in tail in a farm of fifty acres, or to carry on or create a county family. He concludes: "The reference to the division every half-year appears to strengthen this construction, which I arrive at on the frame of the clauses themselves, and without help from authority." The learned Lords Justices upheld that decision. In fact, it was not challenged. But they did so on grounds drawn from the will itself, and do not refer to *Lovelace* v. *Lovelace* (1) at all. Lord Justice Walker's judgment is strongly relied upon as to the word "eldest," but it is clear that he uses it with reference to the particular will. He is so conspicuously careful that one must diligently study his wording: "A devise to a person for life, and after his decease to his issue or male issue would clearly confer an estate tail; and it is now settled that a gift of personalty to a person for life would be a gift for life with remainder to his children as purchasers; but the use of the word 'eldest' in the gift makes it impossible to apply either of those constructions, and therefore I think the Master of the Rolls rightly held that the gift was in each case to the eldest son as persona designata." The testator had included personal estate and real estate in one common phrase; you could not apply the ordinary rule of construction as to either without obviously defeating the testator's intention. The word "eldest" controlled either construction. He does not purport to lay down as a general proposition that the words "eldest son" can never be construed in connexion with the other provisions of the will as words of limitation, as in *Garrod's Case* (2) and other cases cited by Preston. If he had done so, it would be a judgment without argument, and not necessary for the decision, and not binding in comity on this Court.

Adopting the law as laid down in the passage from Jarman, which I have quoted at the beginning of my judgment, I come to consider the will in this case. It is a will dealing with a country gentleman's estate. We are not now in the doctor's study; we are in the squire's parlour—Thomas Phillips Cosby, of Stradbally Hall. He had been reluctantly forced to commit an injustice towards his brother William Cosby. He wishes to "repair that." By giving him a life estate in the lands? That is all he gets on Mr. Jellett's construction—charged with annuities. If no will had been made, William would have taken in fee.

The question here is whether the estates are devised to the eldest legitimate male issue as a direct gift to him from the testator, or whether they come to him by descent. The testator has answered the question. "By descent." I think this in itself is conclusive—i.e., shall "descend." I can give no meaning to the word "descend" consistent with Mr. Jellett's construction. (See *Fay* v. *Fay* (3).)

(1) Cro. Eliz. 40. (2) 2 B. & Ad. 87. (3) 5 L. R. Ir. 274.

The will goes on, "in default of which to the eldest male issue of my brother Sydney," and so on; "binding whoever possesses the Stradbally and Timahoe estates," and gives power for charging a fair and equitable jointure, and portion for younger children. It would seem that the testator intended that Cosby should succeed Cosby at the Hall, and that whoever took under any of the later limitations should take the name of Cosby. Are the words used sufficient to carry out such intention? In my opinion they are. Is there then any rule of construction—any binding authority—to prevent me from giving effect to his wishes? In my opinion, for reasons I have given, there is not.

I am of opinion that the decision of Mr. Justice Wylie was right, and should be affirmed.

RONAN L.J.:—

In this case my judgment is, as I have indicated, supplementary to that of Mr. Justice Dodd. For that reason it may appear a little erratic in passing inconsequentially from one subject to another.

It is plain from the judgment of the Lord Chief Justice that the basis of his decision is the case of *Lovelace* v. *Lovelace* (1), as affirmed by the Court of Appeal in *Sheridan* v. *O'Reilly* (2). If *Sheridan* v. *O'Reilly* (2) decides the question, it is binding upon us, as we are an inferior Court. A decision of a Court is binding when the Court, having a question before it, hears both sides argued, and decides it. In *Sheridan* v. *OReilly* (2) two questions arose, or rather on the will in the case of *Sheridan* v. *O'Reilly* (2) two questions arose—A, Was "eldest male issue" a word of purchase or a word of limitation? The plaintiff contended for one view; the defendant for the other. There was the second and wholly different question—viz., B, assuming it to be a word of purchase, did it mean eldest male issue living at the death of the tenant for life, or issue born though then dead? The summons only dealt with question B. The appeal was limited to question B. The argument, as reported, only dealt with question B; the cases cited by counsel only relate to question B; and, finally, the decisions of both Courts were only decisions on question B.

The observations of the Master of the Rolls and of the Court of Appeal were, therefore, pure dicta on a question not brought before the Court by the summons, and on a question in which all the parties alike were interested in having decided the same way. In these circumstances, I must treat the observations of the Court of Appeal and of the Master of the Rolls as to whether "eldest male issue" was a word of purchase or of limitation as mere dicta. Now, how is a Court to deal with dicta? In *Dashwood* v. *Magniac* (3) Kay C.J. says: "Sir G. Jessel has pointed out in *Quilter* v. *Heatley* (4) and *Ex parte Waley* (5) what, I think, everyone must agree in, the inexpediency of deciding any case upon the authority of the dicta of modern authorities." And speaking of dicta in the House of Lords, Lord Campbell said:—"The observations made beyond the ratio decidendi . . . although they are entitled to respect, are only to be followed in as far as they

(1) Cro. Eliz. 40.
(2) [1900] 1 I.R. 386.
(3) [1891] 3 Ch. 376.
(4) 23 Ch. D. 49.
(5) 23 Ch. D. 127.

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may be considered agreeable to sound reason and to prior authorities." I think it is our duty to take this course in reference to the dicta in *Sheridan* v. *O'Reilly* (1).

In *Sheridan* v. *O'Reilly* (1) the limitations are as follows:—The testator bequeathed his property to trustees upon trust that the rents and profits should be divided into five equal parts, to be paid half-yearly to each of his five nephews, share and share alike, "to be by them enjoyed during the period of their natural lives, and after the decease of each to the eldest male issue respectively of each; and in default of such male issue such share to revert to the remaining legatees, or their eldest male issue, to be divided equally every half-yearly term among them." All the testator's nephews survived him. Three of them died subsequently, intestate and unmarried; one (the husband of the plaintiff) died, having had a son who predeceased him, intestate and unmarried; and the fifth nephew was still alive. It was held by Porter M.R.: 1, that the gift of the income of the property amounted to a gift of the corpus; 2, that the gift after the decease of each to their eldest male issue respectively of each meant to the eldest male issue living at the decease of each. But the Court of Appeal held that the son of the plaintiff's husband took a vested interest at birth, and that the gift to him was a gift to a persona designata, and not to a class.

Now, there is a distinction between rules of construction and rules of law. In *In re Coward* (2) Fry L.J. says:—"In my opinion rules of construction and rules of law differ very broadly in this point of view: one (construction) points out what a Court should do in the absence of express or implied intention to the contrary; the other (rule of law) is one which takes effect when certain conditions are found, although the testator may have indicated an intention to the contrary." That is a very plain and clear distinction.

There are four rules of law applicable to the present case—rules of law, not rules of construction. They are as follows: 1, There is the rule in *Shelley's Case* (3), with which we are all familiar. The second is one of very great importance, and to my mind practically disposes of *Sheridan* v. *O'Reilly* (1). 2, It is the rule laid down at p. 270 of Williams's Real Property (7th ed.). That is the edition of 1867—the last edition published when I became a law student. It is taken from Fearne and from Preston, and is as follows:—"The law having been acquainted with remainders long before uses were introduced into it, will never construe any limitation to be a springing or shifting use which, by any fair interpretation, can be regarded as a remainder, whether vested or contingent" (4). In *Mellish* v. *Mellish* (5), one of the cases like the present, Bayley J. applies this rule to it, saying:—"It is equally clear that words are not to operate by way of executory devise which are capable of operating in any other way."

The two other rules of law are:—3, That in the case of males in equal degree, the eldest only shall inherit; and 4, that lineal descendants shall represent their ancestor as if he were living. Taking these rules of law and applying them to the limitations in *Sheridan* v.

(1) [1900] 1 I. R. 386.
(2) 57 L. T. 285.
(3) Moore's Repts. 136 & 1 Repts. 93*b*.
(4) Wms. Real P., 23rd ed., p. 413.
(5) B. & C. 250.

O'Reilly (1), is there any difficulty in treating the entire as a gift to each in tail male, with cross-remainders in tail between them? Simply read "issue" according to what Lord Wensleydale describes as its technical and legal import, viz., "all the descendants from the body" in succession. Does not that carry out the whole thing?

This having been done, rules 3 and 4 supply the eldest in the descent of the estate tail. The rule in *Shelley's Case* (2) gets rid of the express life estate. Surely the gifts over in default of issue can be construed "by any fair interpretation" as gifts in remainder, and, if so, that operation must be given to the devise, even though the testator may have indicated a contrary intention. This goes to the root of the dicta in *Sheridan* v. *O'Reilly* (1), and applies equally to the limitations to William Cosby and the gift over in the present case.

What are the words of the will in the present case? "I leave and bequeath to my brother, William Cosby, for life all and any estates or money I have the right and power of leaving him . . . after his death to descend to his eldest legitimate male issue, in default of which to the eldest male issue of my late brother, Sydney Cosby, in default of which to the eldest male issue of my late sister," &c. Is there the slightest difficulty, in view of what I have said, in holding that that means an estate tail male to William Cosby, with remainder to the eldest male issue of the brother?

Take these rules of law:—A gift to issue includes, prima facie, descendants of every degree: Hawkins on Wills, 1st ed., p. 87. Descendants include all who proceed from the body of the testator: *Crossley* v. *Clare* (3). "'Issue' and 'descendants,' prima facie, mean the same thing, viz., heirs of the body." "'Issue' is ex vi termini nomen collectivum, and takes in all issues to the utmost of the family as far as heirs of the body would do." This definition was accepted and adopted by Lord Wensleydale in *Roddy* v. *Fitzgerald* (4). He says: "Here we have a technical word, a word of known legal import . . . If the word 'issue' is construed according to its technical or legal import as a devise to all the descendants from the body in succession, the word is a word of limitation."

What is the rule? I read from Hawkins on Wills, 1st ed., p. 189: "The effect of the word 'issue' in devises of real estate as a word of limitation or of purchase has been much controverted. 'Issue' is less technical than 'heirs of the body,' inasmuch as it points out the objects, viz., all generations of descendants, but not the manner in which they are to take, i.e., by descent as heirs. In the important case of *Roddy* v. *Fitzgerald* (5) the ratio decidendi of the Lords shows the disposition of the Courts now to be, to place 'issue' as nearly on a level with the technical words 'heirs of the body' as the course of previous decisions will admit; and although it was formerly said that issue was a word either of purchase or of limitation, as would best answer the intent of the devisor (*Doe* v. *Collis* (6)), it is now firmly established as a rule of construction that, in devises of real estate, 'issue' is, prima facie, a word of limitation and equivalent to 'heirs of the body.'"

(1) [1900] 1 I. R. 386.
(2) Moore's Repts. 136 & 1 Repts. 93*b*.
(3) Ambler, p. 397.
(4) 6 H. of L. Cases, 881, at p. 879.
(5) 9 H. L. C. 823.
(6) 4 T. R. 294.

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It is plain that at the date of *Lovelace* v. *Lovelace* (1) the modern rule did not exist. There is a clear reference to *Wild's Case* (2) in the words "he having no son at the time." *Wild's Case* (2) was subsequent to *Lovelace* v. *Lovelace* (1), but the rule evidently existed. At all events, the rule as now stated is confined to "children," but the resolution in *Wild's Case* (2) plainly treats 'issue' and 'children' on the same basis. For example, "if A devises lands to B, and to his children or issues, and he hath not any issue at the time of the devise," that is an estate tail. "But if a man devises lands to A, and to his children or issue, and he then has issue of his body, they—that is, parents and children—shall have but a joint estate for life."

The rule in *Wild's Case* (2), as stated at the present day, is as follows. I read from Hawkins on Wills, p. 198:—"A devise of real estate to A and his children, A having no children at the time of the devise, vests in A an estate tail, 'children' being construed as a word of limitation." The rule does not apply to bequests of personal estate. It follows that cases as to "issue" prior to the modern rule cannot now apply. That rule did not apply at the date of *Lovelace* v. *Lovelace* (1), and that case therefore ceases to be an authority on a modern will. I am not, therefore, bound to follow *Lovelace* v. *Lovelace* (1). It was a decision at a time when, in the words of Lord Wensleydale, "issue" was "a technical word, a word of known legal import."

The research of Mr. Justice Dodd has discovered the real meaning of *Lovelace* v. *Lovelace* (1). It appears from the argument of Coke, Attorney-General, in *Perrott's Case* (3), that the lands in *Lovelace* v. *Lovelace* (1) were gavelkind. This has been accepted in *Garrod's Case* (4) and in other cases. We are not in this country familiar with "gavelkind," but the subject is dealt with pretty fully in Halsbury, vol. 24, at pp. 151–156; 4 Bacon's Abridgment, at pp. 57–59; 3 Cruise's Digest, p. 388, and in the judgment in *Garrod's Case* (4).

In such a case an estate in tail male would have descended to all the issue male—viz., the sons and all the sons of each son, and so on. This explains the cryptic phrase in the judgment in *Lovelace* v. *Lovelace* (1), "a touts les heires." "Eldest heir" has then a perfectly rational meaning, the eldest of the gavelkind heirs. It is no authority whatever in the case of freehold lands.

It is obvious that whether "eldest male issue" means eldest son, an individual, or eldest lineal issue, a nomen collectivum, it is wholly inconsistent with a construction which would pass the estate to all the male issue. This explains the cryptic "here" passage in the judgment in *Lovelace* v. *Lovelace* (1). It must be read "here" (in this case of a devise of gavelkind lands); the word "eldest" will not permit that construction." When *Lovelace* v. *Lovelace* (1) was cited by Tindal in *Mellish* v. *Mellish* (5), Bayley J. (a great authority) said:—"In *Perrott's Case* (3) it is said that the lands in *Lovelace* v. *Lovelace* (1) were gavelkind." He plainly thought that this explained the decision. It is obvious that where the lands descend to all the sons as heirs or heirs male, "eldest heir" or "heir male" has a definite meaning—viz., the

(1) Cro. Eliz. 40.
(2) 6 Rep. 17.
(3) Moore, p. 371.
(4) 2 B. & Ad. 87.
(5) 2 B. & C. 250.

eldest of the several heirs, one instead of all. In ordinary freeholds which may descend to co-heiresses in fee or tail, it may in such cases have a similar meaning, but in a case of heirs male or issue male it can have no possible effect. It can only apply when the limitation is to a class; it may then fix which member or members of the class take—e.g., in freeholds, co-heiresses; in gavelkind, all the co-heirs.

In *Sheridan* v. *O'Reilly* (1), at p. 392 of the report, the Master of the Rolls says: "But 'next' and 'first' in reference to descent are at most surplusage." I quite agree where the descent must be to one person, but not where it may be to several. He adds—"and differ entirely from 'eldest.'" I confess I fail to see the difference between "first son or daughter" and "eldest son or daughter," where first would be "at most surplusage"; it seems to me absolutely clear that "eldest" must be the same—that is, in the case of freeholds limited to heirs male or issue male. "Eldest heir male," or "heir male of the body," must mean the same thing as heir male or heir male of the body, and this applies equally to issue.

Garrod v. *Garrod* (2) was a case of borough English lands (which descended to the youngest son) and ordinary freeholds comprised in one devise. The devise in the will was to the nephew T. G. for life, and to his son if he has one; if not, to the eldest son of my nephew, and to his son after him if he has one. The codicil stated that T. G. had a son. "I give to him after his father's decease all my lands, &c., and to his eldest son if he has one; but if he has no son, then to the next regular heir of the Garrod family." Substitute "issue male" for "son," and we have the gift in *Lovelace* v. *Lovelace* (3). T. G.'s son was John Garrod; the gift was "to him (John), and to his eldest son if he had one." In *Lovelace* v. *Lovelace* (3) the gift is "to J. D. and to his eldest issue male (he having no son at the time)." It is plain that John had no son at the time. Why did not the word "eldest" prevent the estate tail in the one case and not in the other? "Eldest male issue" plainly points to an estate tail much more than "eldest son."

But in *Sheridan* v. *O'Reilly* (1) the Master of the Rolls' view was that "issue" meant children in that case, and, therefore, that "eldest male issue" meant "eldest son," that is to say, the very words used in *Garrod* v. *Garrod* (2). There was apparently no gift over in *Lovelace* v. *Lovelace* (3). The Master of the Rolls thinks that the *Lovelace* (3) and *Garrod Cases* (2) can stand together. Mr. Justice Dodd has traced Mr. Jarman to his first edition, and the adoption of his view by the great lawyer Wolstenholme, and that eminent authority Vincent.

It seems to me that the two cases may stand together, but solely on the ground that the ratio decidendi in *Lovelace* v. *Lovelace* (3) was gavelkind, and that the case applies only to gavelkind lands. Jarman and his editors were not dealing with gavelkind in the passage in question. The Master of the Rolls says: "Here 'issue' may mean children or it may include all descendants. If the former, it is a word of purchase; if the latter, it must be construed as equivalent to heirs of the body." He then devotes his judgment to showing that "issue" meant children. He refers to *Lovelace* v. *Lovelace* (3) and *Garrod* v. *Garrod* (2), with which I have already dealt. He then comes to

(1) [1900] 1 I. R. 386. (2) 2 B. & Ad. 386. (3) Cro. Eliz. 40.

Appeal. (*S. I.*) 1922.

In re COSBY'S ESTATE.

Ronan L.J.

Hampson v. *Brandwood* (1), where he says the Vice-Chancellor held that "the first male issue took as a purchaser," and he quotes from the judgment. He overlooked the fact that in a deed "issue" is always and must be a word of purchase. In Norton on Deeds, at p. 427, we read: "The word 'issue' in a will may be a word of limitation, but in a deed is always a word of purchase." The reason for the rule is stated as follows in 2 Fearne C. R., 249, s. 509: "In a deed no word except the word 'heirs' will pass an estate of inheritance, and hence the word 'issue' cannot there be a word of limitation. It is, therefore, a word of purchase in this case, because that is the only construction by which it can become operative, not because it is aptly a word of purchase."

The question there was the same as that before the Court and argued in *Sheridan* v. *O'Reilly* (2), viz., who took under an admitted gift to issue as a purchaser? The gift was to A. B. for life, and then to the first male issue lawfully begotten by the said A. B. who should attain twenty-one years, and to the heirs and assigns of such male issue. There was no question of words of purchase or limitation, as the Master of the Rolls seemed to think. The question was whether the purchaser, "the first male issue," meant the eldest son. If it meant the first descendant, the limitation would have been void as a perpetuity, and this would have made the whole deed a nullity. I have read the judgment carefully, and the Vice-Chancellor does not rely on the word "first" as affecting the question. He says: "No case has been found where issue begotten by the settlor has been held to mean other than children." On this Jarman says (vol. ii, 4th ed.), at p. 106: "It has been frequently decided that these words are not sufficient per se to limit a bequest to the issue of A. to his children"; and we find in Hawkins, at p. 87: "It is settled that the addition of the words 'begotten by A.' to the word 'issue' does not necessarily restrict issue to the sense of children (*Evans* v. *Jones* (3))." However, the deed contains clauses where "issue" is used as meaning children. The Vice-Chancellor admitted that "issue" prima facie meant descendants; and he used every possible argument, even "the use of the word in the will of the testator's father, which he might have had in his recollection." He referred to one case in reference to the use of the word "parent" (*Sibley* v. *Perry* (4)). Lord Esher had no objection to the funeral of this case. The Vice-Chancellor made every possible point to prevent the deed being a nullity. But there is one argument he did not use. It is obvious that "first male issue" lawfully begotten means "eldest"; it never occurred to him to think this any ground for holding that "issue" meant children. Yet this was the sole ground which the Master of the Rolls had for holding that "issue" meant children in *Sheridan* v. *O'Reilly* (2). It is, in my opinion, no ground whatever for doing so, and the dictum that "issue" in that case meant children, and "eldest male issue" eldest son, is in the teeth of every case on the subject, particularly since *Roddy* v. *Fitzgerald* (5). I say the sole ground, for no other is suggested, and I can discover none. I see no reason for doubting the rule laid down at page 87 of Hawkins. The Court of Appeal concurred with the Master of the

(1) 1 Madd. 381.
(2) [1900] 1 I. R. 386.
(3) 2 Coll. 516.
(4) 7 Ves. 522.
(5) 6 H. of L. Cases, 881.

Rolls that "eldest male issue" meant eldest son, that is, that "issue" meant children. They did not reserve judgment, and the only case referred to was *Madden* v. *Iken* (1), which only referred to question (*b*) in the summons.

For these reasons I must decline to accept the dicta of the Master of the Rolls or of the Court of Appeal in *Sheridan* v. *O'Reilly* (2) as binding on me.

In conclusion, I desire to point out one or two matters in the will in the present case, which rather distinguish it from the will in *Sheridan* v. *O'Reilly* (2). It will be observed that in the will in the present case there are four gifts to issue—after William Cosby's death "to descend to his eldest legitimate male issue," and in default to the eldest male issue of his late brother, then in default to the eldest male issue of his late sister Mrs. Rochfort, and then in default to the eldest male issue of his late sister Harriett. It is a remarkable fact that the gift to the eldest male issue of William Cosby after his death is to descend to the eldest male issue. The word "descend" is not found in the other three gifts. It has been often pointed out that though issue in tail take per formam doni, they also take by descent from the ancestor. There are statutory rules for the descent of an estate tail. There is nothing to correspond to this word "descend" in *Sheridan* v. *O'Reilly* (2). I would refer to the observations of the Master of the Rolls in *Fay* v. *Fay* (3): "I have come to the conclusion that the testator has by its language—the language of the will—given to his two sons, John Fay and Thomas Fay, estates tail, with cross-remainders between them." That is the view of *Sheridan* v. *O'Reilly* (2) I have been suggesting all through. "The testator then, having made that devise, uses the following remarkable language:—'The fee-simple estates and the freeholds to descend to the heirs of John and Thomas for ever.'" That is, that the testator meant the estate to descend.

In the present will you do not get a case of descent to William Cosby, because "descend" points to lineal descendants. But the will says that after his death the estates are to descend to his eldest legitimate male issue. In the case of the gifts to the children of the deceased brothers and sisters, the word "descend" is not used, because they do not take from their ancestor.

On the appellant's view, all estates, except William's, are in fee. It is a most improbable intention to apply the leasing power, the power to jointure, and to raise portions only to William. Again, the gift over in one case is on "failure of male issue," whilst in the other of "eldest male issue." They really mean the same thing, for if there were any male issue there would be eldest male issue, and the word "eldest" is mere surplusage when it comes to descent.

His Lordship having cited several passages from the judgments in *Tellusson* v. *Rendlesham* (4), concluded by saying that he agreed with Mr. Justice Dodd that the decision of the Court below should be affirmed, and the appeal dismissed.*

Solicitor for Mrs. A. H. Cosby: *Nathaniel Taylor.*
Solicitors for Dudley A. S. Cosby: *Darley, Orpen, & Synnott.*

H. J. M'C.

(1) 2 Dr. & Sm. 207.
(2) [1901] 1 I. R. 386.
(3) 5 L. R. Ir., at pp. 280–1.
(4) 7 H. L. C. 429.

* Neither this judgment nor that of Ronan L.J. in *Loughnan* v. *O'Sullivan*, ante, p. 109, has been revised by him.

High Court of Appeal.
1922.
July 20, 21.

In re MORRIS, Deceased. CONEYS, Plaintiff, *v.* MORRIS, Defendant (1).

(1922. No. 9.)

Banker and customer—Lien—Set-off—Statute-barred debt—Principal and surety—Payment by surety.

M., the principal on a promissory note to the N. Bank, died before the note became payable, and the note was not paid on maturity. After more than six years had elapsed (no part-payment or acknowledgment having been made), the bank set off the amount of the note against moneys due by them to the plaintiff, one of the sureties on the note. The plaintiff then claimed as a creditor of M. to administer his estate in respect of this indebtedness.

Held, affirming the decision of the Court of Appeal in Southern Ireland and the judgment of Powell J., that the plaintiff was not a creditor in respect of the moneys which the bank had applied in discharge of the note.

A bank has not a lien in respect of a deposit or balance to the credit of a customer, inasmuch as there is no specific property on which a lien can operate; the only right of the bank is a right of set-off, but such a right cannot be exercised where a debt is statute-barred and not recoverable.

Appeal by the plaintiff from the order of the Court of Appeal, dated June 14th, 1922, reported ante, pp. 81 and 88, where the facts are set out.

Leonard K.C. (with him *Carson*), for the appellant:—

The bank had a right of lien, and having exercised that right against the appellant, its customer and surety on the note, he is entitled now to recover the amount of the debt so paid from the estate of the deceased, his principal. All moneys paid into a bank are subject to a lien, and all documents, as well as moneys, deposited with a banker may be subject on the banker's part to a lien in respect of any balance that may be due to him from his customer: *Misa* v. *Currie* (2), per Lord Hatherley, at p. 569. [They also referred to *Brandao* v. *Barnett* (3); *Roxburghe* v. *Cox* (4); Grant on Banking, 6th edition, pp. 301, 307, 310; Hart on Banking, 3rd edition, pp. 808, 809, 810, 813; Halsbury, vol. i, pp. 585, 588, 620.] The lien remains, although the debt may be barred by the Statute of Limitations: *Re Broomhead* (5); *In re Carter* (6); *Spears* v. *Hartly* (7). The only Irish case on the subject is that of *The National Bank* v. *Broderick* (8), in which it was held that the bank was entitled to appropriate money held on deposit receipt in satisfaction of a statute-barred debt due by the depositor. Set-off, unlike lien, is limited to debts which can be recovered by action.

C. Murphy (with him *S. L. Brown K.C.*), for the respondent:—

There is no lien in a case like this. The relation between a banker and customer who pays money into the bank is the ordinary

(1) In the High Court of Appeal, before Sir John Ross C., O'Connor M.R., and Henry C.J.
(2) 1 App. C. 554.
(3) 12 Cl. & F. 787.
(4) 17 Ch. D. 520.
(5) 16 L. J. Q. B. 355.
(6) 55 L. J. Ch. 230.
(7) 3 Esp 81.
(8) 31 I. L. T. R. 65*n*.

relation of debtor and creditor: *Foley* v. *Hill* (1). In that case Lord Brougham, at p. 44, says:—"This trade of a banker is to receive money, and use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own, and for which money he is accountable as a debtor." There must be some specific or tangible thing to which a lien can attach, such as bills, papers, or securities of a customer in the hands of a banker: Coote's Law of Mortgages, 8th edition, p. 1412. Here the plaintiff, if sued by the bank, would have had a perfect answer to the action.

Leonard, in reply:—

The banker's right was not, strictly speaking, either lien or set-off, but it combined the characteristics of both, and enabled the bank to adjust accounts.

SIR JOHN ROSS C.:—

I am so satisfied with the judgments in the Court below that I do not think it necessary to reserve judgment. The case for the appellant has been very skilfully and very subtly argued by Mr. Leonard. I have always found a difficulty in understanding how there can be a lien by bankers on customers' money. In Harte's Law of Banking, 3rd edition, p. 810, I find the following statement:—"It is often stated that the lien attaches to money; but inasmuch as, quite apart from any question of lien, a banker is only bound to pay to, or to the order of, his customer the amount of the balance due to the latter after deducting what is due to the banker himself from the customer, the lien will not normally have any effective application to the moneys." In support of that statement of the law, the author cites *Roxburghe* v. *Cox* (2). The lien suggested in this case is not like any other kind of lien with which we are familiar. In the ordinary case there must be some specific thing to which the lien can attach, but in this case where is the specific entity to which it is attached? In this case there are two accounts—a current account and a deposit account. The lien could not be on the current account, because it was not in funds. How can it be on the deposit account? That account consisted of money paid in by the customer on deposit, and which became the money of the bank. There are no indicia of ownership in the hands of the bankers which could be applied by them. The indicia of ownership, the deposit receipts, are in the hands of the creditor, the depositor; and that being so, the right of the bankers is a right of set-off, but that right can be exercised only where there are in existence legal enforceable debts. A banker's right is the right of adjustment of credits and debits, and it is involved in this that the debts must be enforceable.

For these reasons it seems to me there is no substance in the contention made on behalf of the appellant. The decision of the Court below was right, and the appeal must be dismissed.

O'CONNOR M.R.:—

When the appellant paid the bank the balance due on foot of the promissory note, the debt was barred by the Statute of Limitations; but his case is that he had no choice in the matter, because he

(1) 2 H. L. C. 28. (2) 17 Ch. D. 520.

High Court of Appeal. 1922.

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O'Connor M.R.

had moneys on deposit with the bank, and if he did not pay the balance due on the note, the bank would assert a lien on the moneys in its hands and refuse to pay them.

It was contended that, although the debt on the note was barred, the lien remained, and could not be discharged unless the debt was paid, just as in a redemption suit the plaintiff must pay all money due irrespective of the statute. In my opinion, this line of argument is not applicable to the present case, and arises from a loose use of the word "lien" in bankers' transactions. Bankers have a general lien on all property of their clients of which they have possession, and this is an implied pledge, as said by Lord Campbell in *Brandao* v. *Barnett* (1). But a lien requires for its existence some specific thing on which it operates either by possession of the specific property itself, such as plate or jewels, or by possession of the indicia of ownership, such as title-deeds, a policy of assurance, or a bond. The extension of the term "lien" to a right of set-off against a balance in bank to the credit of the client is not strictly proper, because there is no specific thing which represents the balance. The balance does not earmark any particular asset in the hands of the bank. It merely indicates a debt by the bankers to the client of a certain amount. It only raises the relationship of debtor and creditor, which gives the client a right of action. If, when the action is brought, the bank has a claim against the client, it has a right of set-off which is just as effectual as a lien; but it is only in this sense a lien, and not a lien properly so called. If it were a lien, it would give a right of action equivalent to a redemption suit; but I never heard of such an action being brought to recover a debt. If the debt is owing, a simple common law action is open, such as for money paid to the use of the defendant, or money had and received. In such an action there may be a set-off, but the set-off must be for a recoverable debt, and not one barred by the Statute of Limitations.

The learned counsel for the appellant mentioned a decision of the late Lord Chief Baron, in which he held that a bank had a lien in its proper restricted meaning on a balance in its hands. That decision is not regularly reported, but mentioned in a foot-note in "The Irish Law Times." Owing to the present dislocation of business, I have not had an opportunity of reading this note; but we were told that the supposed lien was evolved out of the circumstance that the bank before making the payment should segregate from its general assets a particular sum of money, and that having once done so a specific piece of property would come into existence, and that the lien would eo instanti attach to it. This is very ingenious, but it does not bear examination. The lien must proceed from some act of the client. It cannot be created by the bank. If there be a lien, it must exist at and before the date of the demand for payment. It cannot result from it.

I agree that the appeal should be dismissed.

HENRY C.J.:—

I concur in the judgments delivered by the Lord Chancellor and the Master of the Rolls, and in the reasons which they have given.

Solicitors for the appellant: *R. J. Connolly & Son.*
Solicitors for the respondent: *Barrington & Son.*

C. L.

(1) 12 C. L. & F. 787, 805.

IN THE MATTER OF THE ESTATE OF HENRY O'CONNOR, DECEASED. BETWEEN JOSEPH M'DERMOTT, PLAINTIFF; HIS MAJESTY'S ATTORNEY-GENERAL FOR IRELAND AND ALPHONSUS M'DERMOTT, DEFENDANTS. CONSOLIDATED WITH IN THE MATTER OF THE ESTATE OF MARY O'CONNOR, DECEASED. BETWEEN ALPHONSUS M'DERMOTT, PLAINTIFF, AND HIS MAJESTY'S ATTORNEY-GENERAL FOR IRELAND AND JOSEPH M'DERMOTT, DEFENDANTS.

M. R.
1921.
Nov. 6, 11.

Appeal.
(*S. I.*)
1922.
July 18, 31.

(1920. No. 506.)

Charity—Gift by will to—Charitable Donations and Bequests (Ireland) Act, 1844 (7 *& 8 Vict. c.* 97), *ss.* 15, 16—*Estate in land—Trust for conversion—Death of testator within three months of execution of will.*

H. O'C. by his will devised and bequeathed all his real and personal property not thereby otherwise disposed of to trustees upon trust to sell, call in, and collect the same, and out of the moneys to pay his funeral and testamentary expenses and debts, and the legacies other than specific thereby bequeathed. He bequeathed twelve pecuniary legacies of £500 each to twelve charitable institutions, and directed that they should not be payable till after the death of his sister M. O'C. He bequeathed to her for life the net income of all his residuary, real, and personal estate, and all investments representing the same. He further devised and bequeathed, after payment of the charitable legacies, the net residue of his property on his sister's death upon trust for such of the charitable institutions as he had previously named in his will as his trustees should select, and they appointed the residuary estate among the charitable institutions mentioned in the will in equal shares. H. O'C. died within three months from the date of his will, leaving M. O'C. his sole next-of-kin and heiress-at-law him surviving. M. O'C. by her will gave certain legacies, and devised and bequeathed the residue of her property, real and personal, in equal shares to the several charitable institutions named in her brother's will. She also died within three months from the date of her will.

Held, by the Master of the Rolls and by the Court of Appeal in Southern Ireland, that M. O'C. as heiress-at-law and next-of-kin of H. O'C. became entitled to his real and chattel real estate subject to the trust for conversion, and that she took the real and chattel real property in its converted state.

But *held* by the Court of Appeal, reversing the Master of the Rolls, that M. O'C. took an "estate in lands" under the will of H. O'C., and that, there being under his will a valid existing trust for sale of the lands, the equitable fee was vested in all the persons entitled to the money resulting from such sale, and that therefore the residuary devise in M. O'C.'s will was invalid as contravening the 16th section of 7 & 8 Vict. c. 97.

FURTHER CONSIDERATION.

Henry O'Connor died January 26th, 1920, having made his will on January 19th, 1920, by which he devised and bequeathed his real and personal property not thereby otherwise disposed of to his trustees and executors upon trust that they should call in and collect the same, and should out of the moneys arising thereby and all other moneys forming part of his estate pay his funeral and testamentary expenses and debts, and the legacies other than specific legacies thereby bequeathed. He bequeathed certain personal pecuniary legacies, amounting in all to £2,500. He bequeathed

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twelve pecuniary legacies of £500 each to twelve charitable institutions, and £100 for Masses to be offered up in Ireland for the repose of his soul. He directed that the charitable legacies should not be payable till after the death of his sister, Mary O'Connor, and he bequeathed to her for life the net income of all his residuary real and personal estate, and all investments representing the same. He further devised and bequeathed the net residue of his property on his sister's death after the payment of charitable legacies upon trust for such of the charitable institutions as he had previously named in his will as his trustees and executors should select. In pursuance of this power they appointed the residuary estate among the charitable institutions mentioned in the will in equal shares. The testator died within three months from the date of his will, leaving his sister, Mary O'Connor, his sole next-of-kin and heiress-at-law. She made her will on 2nd April, 1920, and died within three months of this date. She bequeathed the sum of £700 to her executors for the purpose of erecting a stained-glass window in St. Kevin's Catholic Church, Dublin. She gave one personal legacy of £50, and legacies of £60 in all for Masses for the repose of her soul. She devised and bequeathed the residue of her property, real and personal, describing as both that which was her own or which she held in her own right as heiress-at-law of Henry O'Connor, in equal shares to the several charitable and religious communities, organizations, and institutions named in the will of her brother, Henry O'Connor. Mary O'Connor died on the day after she made her will, and was entitled to some real estate independently of that which had been the property of Henry O'Connor.

H. Wilson K.C. and *Morgan Byrne*, for the executors and trustees of Henry O'Connor and Mary O'Connor.

FitzGibbon K.C. and *Sainsbury* (with them *Denning K.C.*), for Alphonsus M'Dermott, an heir-at-law of Mary O'Connor.

S. L. Brown K.C. and *L. R. Lipsett*, for the Attorney-General.

H. Hamilton, for two next-of-kin of Mary O'Connor.

Jellett K.C. and *Poole*, for three next-of-kin of Mary O'Connor.

V. Rice, for Hugh Mailey, an heir-at-law of Mary O'Connor.

O'CONNOR M.R., having stated the facts, continued :—

Mary O'Connor having died within three months of the date of her will, the residuary gift, as far as related to real or chattel real estate, failed, as it was made for charitable purposes.

This raises the question whether the real and chattel real estate of Henry O'Connor, which had devolved upon his sister as his heiress-at-law and sole next-of-kin, devolved upon her as land or money. If it devolved upon her as land, she died intestate as to it, and it has passed to the heir-at-law so far as it is freehold, and to her next-of-kin so far as it is chattel real. It is clear that there was a resulting trust for Mary O'Connor as his heiress-at-law and sole next-of-kin of the real and chattel real estate of Henry O'Connor, or so much thereof as was not required for the payment of funeral and testamentary expenses and

Crown duties. This is in accordance with the aw as laid down by Lord Thurlow in the well-known case of *Acroyd* v. *Smithson* (1), and for the reasons given in the celebrated argument of Lord Eldon. But the trusts which failed under the will of Henry O'Connor by reason of his death within the three months were set up by the will of Mary O'Connor, who had become entitled to his undisposed of real and personal estate; and the real question is whether the residuary devise in her will so far as it included Henry O'Connor's lands also failed on account of her death within the three months. It goes without saying that if Henry O'Connor's charitable dispositions failed so far as they embraced real estate, so also did Mary O'Connor's. But the contention of the Attorney-General is that, although there was a resulting trust for Mary O'Connor of Henry O'Connor's real estate, it came to her subject to the trust for conversion, and therefore in the character of personal estate; and being personal estate, the disposition thereof by her will for charitable purposes was not defeated by her death within three months.

In re Richardson, Scales v. *Heyhoe* (2), was relied upon as authority for this proposition. In that case the testator devised his real estate upon trust for sale, and directed that the proceeds should form part of his residuary personal estate. He then bequeathed his residuary personal estate, subject to certain life interests, to a class on a contingency, but the members of such class, owing to deaths and other circumstances, were unable to take. The trusts of the will, however, did not entirely fail, but continued to be executed during the life tenancies, after the cesser of which the trusts were at an end, and the period of distribution arose. Sales of the real estate had been made from time to time, but some portion still remained unsold. It was admitted that owing to the failure of the contingent class there was a resulting trust of the devised realty for the testator's heir, who was his sister. She had, however, died intestate; and a contest arose between her personal representatives and her heir. The heir of the heir admitted that the legal personal representatives of the heir were entitled to the proceeds of the sale of the real estate actually sold at the time of distribution, but contended that he was entitled to the unsold real estate. The personal representatives of the heir claimed both the proceeds of the sale of land which had been sold and the unsold land as personal estate of the heir. Chitty J., in his judgment, said :—"It appears to me that the decisions have always gone on the footing that the heir who takes under circumstances such as these takes the property in the state into which it is converted by the will. Where there is a partial undisposed interest of real estate directed to be sold, that interest results to the heir of the testator as personal estate in his hands; of course, so long as he is alive it is immaterial whether it is real or personal estate; but on his death it appears to me on principle, as well as by virtue of the authorities which are summarized in Jarman on Wills (4th ed., vol. i, p. 630), that the proposition I have just stated is correct; and I do not remember in my experience to have heard it questioned. There is the other proposition, namely, that if the purposes of the direction for conversion in the will wholly fail—that is, if all the legatees of the moneys

(1) 1 Bro. Ch. 503; 1 W. & T. L. C., 8th ed., p. 394. (2) [1892] 1 Ch. 379.

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to be produced by the sale die in the testator's lifetime, so that there is a total failure of the objects for which the conversion was to be made—the property will devolve upon the heir as real estate. But I have to deal with the case of a partial failure." Now, the present case is one of partial failure, because the trustees for the purpose of administering their trust should sell all the real estate. They were directed to do so. The legacies which became operative were charged upon the real and personal estate, and were payable out of both. Further, the tenant for life was entitled to have the entire real estate sold, because she was to have for her life the income of the investments of the proceeds of sale. There was therefore only a partial failure of the objects of the trust for conversion. The case comes within the decision of Chitty J.; and I am of opinion that Mary O'Connor's will, so far as it disposed of her interest in the real and chattel real estate of Henry O'Connor, did not dispose of lands or any estate therein, but of pure personal estate. On this view, Mary O'Connor's will, so far as it dealt with Henry O'Connor's estate, did not fail by reason of her death within three months from the date of the will. But Mr. Jellett, who appeared for three of the next-of-kin of Mary O'Connor, contended that even if the case were covered by *In re Richardson, Scales* v. *Heyhoe* (1), still under the special terms of the sixteenth section of the Charitable Donations and Bequests Act, the charitable trusts declared by the will of Mary O'Connor failed to the extent of Henry O'Connor's lands, both real and chattel real. He called attention to the fact that the section covered "any estate in lands," and contended that although she became entitled to Henry O'Connor's lands as personal estate, she had an estate of some sort in them which came within the description "any estate."

Mr. Jellett cited *Brook* v. *Badley* (2). In that case a testator by his will gave his real and personal estate to trustees, with directions to sell the real estate and other available property, and, after payment of his debts and certain legacies, directed the trustees out of the money so arising after his wife's death to set apart £6,000, and to pay £3,000 thereout to a legatee therein named. This legatee sold the legacy to a lady, who by her will gave all her personal property applicable for the purposes of mortmain to trustees upon trust for charitable purposes. At her death the widow of the original testator was still living, and the £6,000 had never been raised. It was held that the sum of £3,000 forming part of the lady's estate was an interest in land, and could not be bequeathed for charitable purposes. This was the judgment of Cairns C., who pointed out that although a person could not insist on entering upon the land or taking the land or enjoying the land quâ land, and that his only right might be to come to the Court to make the land productive for him, yet that he had an interest in the land. In this way he brought the case within the third section of the Statute of Mortmain (9 Geo. 2, cap. 39), and held that the bequest of the legacy of £3,000 for charitable purposes was invalid. Mr. FitzGibbon and Mr. Rice, for the co-heirs of Mary O'Connor, advanced a similar argument. But in the present case we are concerned with the sixteenth section of the Charitable Donations and Bequests Act (7 & 8 Vict., cap. 97). That section only deals with an "estate" in lands.

(1) [1892] 1 Ch. 379.

(2) L.R. 3 Ch. App. 672.

There is no mention of an "interest" in lands, as in the third section of the Mortmain Act. This is significant, because the draftsman of the later Act must have had the existing Act in mind, and the restriction of the later Act to an "estate" in land must have been with the intention of narrowing its operation. This distinction between the Statute of Mortmain and the Irish Act has been recognized and acted upon by the Vice-Chancellor in *Stewart* v. *Barton* (1). He there held that a bequest of a sum of money secured by an existing charge on lands for pious and charitable uses was not void, even though the donor died within three months after the execution of the will. He held that the subject-matter of the bequest was not an estate in land within the meaning of the Irish Act. He relied upon the difference in the language used in the English Act, which indicated a much wider policy of restriction. He also called attention to the wording of the fifteenth section of the Irish Act, which enabled testators to give and grant to the Commissioners all their "estate, interest, or property" in lands for certain purposes. This is an enabling section. The next section (the sixteenth) is restrictive, and the omission of the words "interest or property" and the use of the word "estate" by itself was to the Vice-Chancellor's mind an indication that the Legislature intended the sixteenth section to have a more restricted meaning than the fifteenth.

Now, Mary O'Connor had not at her death any beneficial estate in her deceased brother's lands. He had devised all his estate therein to his trustees upon trust for conversion, and the estate remained with them up to the date of her death. No doubt she had an interest in the lands, because she had become entitled to the surplus proceeds of the sale. She had also this further interest—that by discharging all claims upon the lands she could have called for a conveyance of the lands. But the claims had not been discharged at her death, and the trust for conversion remained operative. For the reasons I have mentioned and on the authorities as they stand, I hold—first, that Mary O'Connor, as sole heiress-at-law and next-of-kin of Henry O'Connor, became entitled to his real and chattel real estate, subject to the trust for conversion; second, the real and chattel real estate was taken up by her in its converted state, that is, as pure personal property; third, that the residuary devise in her will so far as it dealt with the estate of Henry O'Connor is valid, notwithstanding her death within three months from the execution of her will. Mary O'Connor had real estate other than that which she acquired as heiress-at-law of Henry O'Connor, and as to such real estate she died intestate. The residuary devise in her will for charitable purposes having failed, her heir-at-law is entitled to this real estate. Her next-of-kin have no interest in her estate, because she had no chattels real of her own.

R. R.

Mrs. Catherine Fitzpatrick, one of the next-of-kin of Mary O'Connor, deceased, appealed to the Court of Appeal in Southern Ireland (2) for an order that so much of the judgment of the Rt. Hon. the Master of the Rolls might be set aside or varied as adjudged that

(1) I.R. 6 Eq. 215. (2) Before MOLONY C.J., RONAN L.J., and DODD J.

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(*a*) Mary O'Connor, deceased, held the real estate and chattels real to which she became entitled as heiress-at-law or next-of-kin of Henry O'Connor, deceased, as part of her pure personal estate; and (*b*) the residuary devise and bequests for charitable purposes contained in the will of the testatrix, Mary O'Connor, is valid; and for a declaration that by reason of the death of the testatrix, Mary O'Connor, within three months from the making of her will the several charitable legacies thereby bequeathed failed so far as same were made payable out of the real and chattel real estates to which she became entitled on the death of Henry O'Connor; and that by reason of such failure her next-of-kin became entitled thereto.

Jellett K.C. (with him *Gibson K.C.* and *H. Hamilton*), for two of the next-of-kin of Mary O'Connor:—

The conversion is directed for specific purposes; the charitable legacies are to be paid out of the proceeds of the sale. The payment is postponed until after the death of Mary O'Connor. It is not permissible to give lands on trust for sale, and to give the proceeds of that sale for charities. The effect would be to create an estate in land which is forbidden. Accordingly, as regards these charitable gifts, the will of Henry O'Connor fails. Mary O'Connor then takes under an intestacy. She is heiress-at-law and sole next-of-kin. She purports to benefit the same charities out of the same subject-matter, and dies within three months of the date of her will. At the date of Henry O'Connor's death the land was unsold, and Mary O'Connor could not by her will do what Henry O'Connor's will failed to do. The policy of the Act of Parliament is clear; and that cannot be done indirectly which the Act of Parliament forbids to be done directly.

S. L. Brown K.C. (with him *John O'Byrne*), for the Attorney-General:—

The point to be decided for the first time is a narrow one. Admittedly there is a general trust for conversion for all the purposes of the will. Therefore there was a complete disposal of the estate—a complete trust and an imperative trust. Admittedly that trust failed quoad the charities. Admittedly the heiress-at-law acquired the real estate as heiress-at-law, and took the chattels real as sole next-of-kin. She took partly as heiress-at-law and partly as sole next-of-kin. She took the estate not merely as personalty, but as money. The conversion had taken place. There was always a possibility, by declaration or otherwise, for this lady to take the estate in the form of land or to reconvert. It was open to her to elect to take it as land if she so wished. Assume that the trustees had actually sold the lands, and the proceeds were in their hands in the shape of money, could anyone then suggest that the money was tainted with the odour of real estate? The doctrine of conversion made it money, and she could deal with it as money.

Herbert Wilson K.C. (with him *Morgan Byrne*), for the executors of Mary O'Connor, deceased.

Fred Denning K.C. (with him *Sainsbury*), for Alphonsus M'Dermott, an heir-at-law of Mary O'Connor.

[Authorities cited and discussed:—7 & 8 Vict. c. 97, s. 16; *Sherlock* v. *Blake* (1); *Beardwood* v. *Coates* (2); *Donnellan* v. *O'Neill and Others* (3); *Brook* v. *Badley* (4); *Cooper* v. *Cooper* (5); *Re Richardson* (6); *Murland* v. *Perry* (7); definition of "estate" in Fines and Recoveries Act, 1833; and definition of "estate" in Stroud, vol ii, p. 642; *Stewart* v. *Barton* (8); *Fletcher* v. *Ashton* (9); *Cookson* v. *Reay* (10); *Jeffries* v. *Alexander* (11); *Smith* v. *Claxton and Others* (12).]

Cur. adv. vult.

MOLONY C.J.: Lord Justice Ronan will deliver the judgment of the Court.

RONAN L.J.*:—

In this case the statutes, facts, and documents are all fully set out in the judgment of the Master of the Rolls; and I shall not waste public time by going through them. After dealing with the two wills, the two statutes, and the authorities, including *In re Richardson, Scales* v. *Heyhoe* (6), he comes to the conclusion that Mary O'Connor took the property as personal estate.

We are all of opinion that the decision of the Master of the Rolls cannot be sustained, for the following reasons:—1, Take the case in which T devises the lands of X to trustees on trust to sell and pay half of the proceeds to A and half to B. B dies in the lifetime of T. H, his heir-at-law, takes his half, and takes it as personal estate. The lands are not sold. The trustees have the legal fee in the lands. Where is the equitable fee in that case? Where is the beneficial ownership of the lands? Surely it cannot be doubted that the equitable fee is in the persons entitled to the proceeds of sale. They are the beneficial owners. Has the beneficial owner of the lands any estate in the lands? The answers to these questions are, to my mind, plain beyond doubt.

If we substitute all the letters of the alphabet for A. and B, it makes no difference. If a gift fails, it is immaterial from what cause it fails. Mr. Jellett very properly cited *Cooper* v. *Cooper* (5), in which Lord Cairns held that a person who is entitled to the proceeds of sale of land was the real owner of the land. Whether he is entitled to the whole of the proceeds, or to a fraction of them, only goes to the extent of his estate. The difference between the purchase-money of land alone and that of land and chattels in such a matter as this is only that in the one case the gift wholly fails, while in the other it fails pro rata only. If A devised to X what he took under the will of T, and B devised to Y what he took as heir-at-law of T, it would in each case be a devise of half the equitable fee. These simple propositions seem to me to rule this case. Indeed, one proposition lies at the very

(1) 10 Ir. Jur. N. S. 350.
(2) 18 W. R. 1154.
(3) I. R. 5 Eq. 523.
(4) L. R. 3 Ch. App. 672.
(5) L. R. 7 H. L. 64.
(6) [1892] 1 Ch. 379.
(7) 3 L. R. Ir. 135.
(8) I. R. 6 Eq., at p. 221.
(9) 1 W. & T. 385.
(10) 5 Beavan, 22.
(11) 8 H. L., at pp. 620 and 678.
(12) 4 Madd. 492.

* Not revised by Ronan L.J.

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root of the case, and it is this, that where there is a valid existing trust for sale of lands, the equitable fee is vested in all the persons entitled to the purchase-money.

As I have said, the facts and documents are fully set out in the judgment of the Master of the Rolls. Put shortly, Henry O'Connor gave all his estate, real, chattel real, and chattels personal, to trustees on trust to sell and convert into money. That created a mixed fund. He then proceeded to deal with this mixed fund. He gave part of it to various persons; the other part, £6,000, and the residue he gave to charities; the fact that he gave a life interest to his sister is immaterial. For simplicity, let us assume that the real and chattel real estate of the testator was equal in value to the pure personal estate. It is admitted that in these circumstances the gift to the charities would fail as to one-half the amount thereof, as the legacy is payable out of the different portions of the estate of the testator pro rata according to their value. Accordingly, it is admitted that the gift in the will of Henry O'Connor did fail in this proportion. Why? On account of the provision of the sixteenth section of the 7 & 8 Vict. c. 97. The language of the section is peculiar. "No devise . . . or bequest . . . for charitable . . . uses, shall be valid to create or convey any estate in lands . . . unless," etc. The gifts to charities in Henry O'Connor's will, therefore, are invalid, because they would "create or convey" an estate in lands. All this is in accordance with the opinion of the Vice-Chancellor, as appears from his references to *Sherlock* v. *Blake* (1), and to his own decision in *Bearwood* v. *Coates* (2); and the decision of the Master of the Rolls in *Donnellan* v. *O'Neill* (3) at pp. 220 and 221 of his judgment in *Stewart* v. *Barton* (4).

This was also the view of the Master of the Rolls in the present case, as he says in his judgment: "The charitable legacies failed so far as they are payable out of his real and chattel real estate." That is, of course, because these moneys were pro tanto "an estate" in the lands within the meaning of section 16. They were not disposed of by the will, because the gift failed.

Accordingly, so far as freeholds are concerned, they passed to the heir-at-law, and chattels real to the next-of-kin. Mary O'Connor was heiress-at-law and sole next-of-kin. What passed to her? The gift that failed, because it was "an estate in lands" within the meaning of section 16. She took what the charities would have taken if the gift had been valid. Her rights—I use a neutral word—in respect of it were precisely the same as those of the charities if the gift had been valid. But the rights of the charities would have constituted "an estate in land" within the meaning of section 16.

The Master of the Rolls describes Mary O'Connor's position thus: "No doubt she had an interest in the lands, because she had become entitled to the surplus proceeds of the sale" [as the residuary gift in the will had failed]. "She had also this further interest, that by discharging all claims upon the lands she could have called for a conveyance of the lands. But the claims had not been discharged at her death, and the trust for conversion remained inoperative." Does not this specifically and accurately define the position of the charities

(1) 10 Ir. Jur. 350.
(2) 18 W.R. 1154.
(3) I.R. 5 Eq. 538.
(4) I.R. 6 Eq. 220.

if the gift had been valid? But this interest was admittedly "an estate in lands" within the section. This seems to me to conclude the case. Mr. Jellett referred us to *Brook* v. *Badley* (1) and to *Cooper* v. *Cooper* (2). These are conclusive authorities on the main proposition that the persons entitled to the proceeds of the sale of land are the real owners of the land.

In conclusion, I may point out that "estate" has been described as the widest term known to the law. Reference to the reading on the subject at p. 272 of Norton on Deeds will show the comprehensive nature of the term. The cases before the Vice-Chancellor are based on the distinction between an estate and charges on an estate. The decisions have no application to the present case; but, as I have shown, the judgment supports the view I have taken.

We are all of opinion that the decision of the Master of the Rolls should be reversed.

Solicitor for the executors of Mary O'Connor: *Edmund Mooney.*

Solicitors for Alphonsus M'Dermott and Hugh Mailey: *Sainsbury & Co.*

Solicitors for the Attorney-General: *J. O'Connor & Co.*

Solicitor for two of the next-of-kin: *A. Lane Joynt.*

H. J. M'C.

(1) L.R. 3 Ch. App. 672.

(2) L. R. 7 H. L. 64.

Ch. Div.
(S. I.)
Powell J.
1922.

Feb. 21.
April 3.

Re GAVAGAN, an Infant.

Infant—Custody—Illegitimate child—Right of father to custody of illegitimate child of wife—Benefit of child.

The respondent gave birth to an illegitimate male child, and subsequently married the father. After the marriage the child resided with his parents, and was supported and maintained by his father as one of the family. Disputes having arisen between husband and wife, the latter left her husband's house; and having taken the illegitimate child with her, sent him to some friends. She refused to disclose where or in whose custody the child was, but admitted she knew the place of his residence, and could produce him if she desired. Her brother was prepared to undertake the maintenance and education of the child, and to start him in life. On application by the father for the custody of the child:

Held, that s. 53 of 1 & 2 Vict. c. 56 imposed an obligation on the father to support and maintain the infant illegitimate son, which obligation the father had been willing to fulfil, and had fulfilled until prevented by the act of the mother, and that therefore the father was prima facie entitled to the custody of the child; but that even if the wishes of the mother were to be primarily considered, it was not for the benefit of the child to remove him from the custody of a person bound and willing to support him to the custody of a person unknown to the father and to the Court.

Summons.

The application, the subject of this report, was made on behalf of James Gavagan against Alice Gavagan, claiming custody of James Morris, the illegitimate child, and for an order that the mother should deliver up the boy. At the hearing Mrs. Gavagan was cross-examined, but refused to tell the Court where the child was being kept, admitting that she knew where he was, and could produce him if she desired.

The facts of the case were shortly as follows:—On the 22nd June, 1913, James Gavagan married Alice Morris in accordance with the rites and ceremonies of the Roman Catholic Church. Mrs. Gavagan, at the time of her marriage, was a member of the Church of Ireland, and did not then or subsequently change her religious profession. On the 11th June, 1913, Mrs. Gavagan (then Alice Morris) gave birth to a son, whose father admittedly was James Gavagan. Apparently the mother caused this child to be baptized as a Protestant; but in 1918 his father had him baptized by a priest as a member of the Roman Catholic Church. James Gavagan alleged that his wife had agreed that all children of the marriage, and also this illegitimate son, should be baptized as Roman Catholics; but Alice Gavagan, while admitting such agreement in respect of the children of the marriage, alleged that the illegitimate son was not included in its terms.

At the time of the marriage James Gavagan was employed as a night foreman by the Midland Great Western Railway. His wife's brother, James Morris, an engine driver, was also in the employment of the company, and from the marriage until the early part of 1920 James and Alice Gavagan resided with the wife's brother. In 1920 James Gavagan rented a house from his employers, to which he, his wife and family, and James Morris went to reside. There was also resident there as a member of the family a girl named Ida Morris, whom Mrs. Gavagan had adopted. Four children were born in wedlock

to Mr. and Mrs. Gavagan, i.e., Isabella, Denis, Kathleen, and Daniel. The first dispute between husband and wife arose in 1918, when the father had the illegitimate son John baptized as a Roman Catholic. In 1920 this boy, having been sent to a Protestant National School, was removed by his father. According to the mother, the father used violence and intimidation towards her, and owing to these acts and a threat by the father to put James under lock and key, she became alarmed, and fearing the threat would be carried into effect, she arranged to have the boy removed; and on the 10th August, 1920, sent him to some friends, by whom he was being cared for at the date of the application. She further alleged that her husband inquired where the boy was. On being informed that he was with her friends; her husband said that he would have his son back by the evening, and then went to his sister's house, to which he removed the three elder children of the marriage, leaving the youngest, Daniel, with her. Since 18th August, 1920, her husband had not returned to live with her, and she had been supported by her brother, James Morris.

On the 20th April, 1921, an application was made by Mrs. Gavagan to the Court for the custody of the children, Isabella, Denis, and Kathleen; but at the hearing counsel on behalf of the applicant did not press for an order for custody, but asked for an order giving Mrs. Gavagan access. This order was made accordingly. At that hearing Mrs. Gavagan was cross-examined by counsel for James Gavagan, and when asked where James Morris then was admitted that she had removed him from his father's house, but declined to say where the boy was residing.

In an affidavit in reply to the application, Mrs. Gavagan stated that James Morris was nine years of age; that having been from his earliest years instructed in the Protestant religion, he was of an age at which any change of religious instruction would be calculated to shake the foundations of his faith and do him irreparable injury, especially as he had already shown evidence of such religious convictions as were possible at his age; and that it would be extremely undesirable and adverse to his interests to make any change in his tuition or environment. James Morris, Mrs. Gavagan's brother, in an affidavit swore that he was willing to be responsible for the upkeep, maintenance, and education of the boy during his minority, and to provide the means for his attendance at a suitable boarding school, and subsequently to arrange for his apprenticeship to some suitable trade or occupation.

The Poor Relief Act, 1838 (1 & 2 Vict c. 56), s. 53, provides:—"For the purposes of this Act every husband shall be liable to maintain his wife and every child under the age of fifteen, whether legitimate or illegitimate, which she may have had at the time of marriage with such husband; and every father shall be liable to maintain his child, and every widow to maintain her child, and the mother of every bastard child to maintain such bastard child until every such child respectively shall attain the age of fifteen years; provided always and be it declared, that nothing herein contained shall be taken to remove or lessen the obligations to which any husband or parent is by law liable in regard to the maintenance of his wife or children, legitimate or illegitimate respectively, independently of this Act."

Ch. Div. (S. I.) Powell J. 1922.

Re GAVAGAN.

Finlay, for James Gavagan:—

Under the Poor Relief Act, 1838 (1 & 2 Vict. c. 56), s. 53, an obligation to support is imposed on the husband in relation to the illegitimate children of the wife. The applicant is bound to support James Morris, and was in fact doing so until the mother removed him. The obligation imposed by the Poor Relief Acts has been recognized by the Courts on applications for custody of illegitimate children: *Barnardo* v. *M'Hugh* (1); *Humphrys* v. *Polak* (2); Vaughan Williams L.J., at page 388; *In re Connor* (3).

H. Hughes, for Mrs. Gavagan:—

The Court in considering such application will consider the wishes of the mother and the benefit of the child. It is submitted that the provisions of the Poor Relief Act, 1838 (1 & 2 Vict. c. 56), do not do away with the right of the mother, or alter the practice that her wishes should be considered in the case of custody of an infant illegitimate child.

Finlay, in reply.

Cur. adv. vult.

POWELL J., having stated the facts, continued:—

I am only dealing on the present application with the question of the custody of the infant.

What are the rights to the custody of an illegitimate child as between the father and mother who have married? There does not appear to be any direct authority upon this point. The case has been extremely and exceptionally well argued by Mr. Finlay for the father, and by Mr. Hughes for the mother.

In *Barnardo* v. *M'Hugh* (1) it was held, that "in determining who is to have the custody of and control over an illegitimate child, the Court, in exercising its jurisdiction with a view to the benefit of the child, will primarily consider the wishes of the mother." There the respondent was the mother of an illegitimate child by a man with whom she lived for twenty years. The boy was born in December, 1878, baptized in a Roman Catholic Church in 1880, and again baptized in a Protestant Church in 1884. In 1886 respondent married a man named M'Hugh. In June, 1888, the boy was admitted into one of the homes for destitute children, of which the appellant was the founder, the mother signing an agreement to leave the boy under the care of the managers of the home to be maintained and educated for twelve years, and not to remove him during that period without their consent. In January, 1890, the appellant was required, in accordance with an authority signed by the mother, to deliver the boy to a person named by her. The appellant having, after some correspondence, refused to do so, a rule nisi was obtained calling on him to show cause why a writ of habeas corpus should not issue commanding him to bring up the body of the boy before the Court. The Queen's Bench made the rule absolute, and also made an order appointing a Mr. Walsh, a Roman Catholic, nominated by the mother, guardian of the person of the boy. These decisions were affirmed by the Court of Appeal, and the decision of the Court of Appeal was affirmed by the House of Lords.

(1) [1891] A. C. 388. (2) [1901] 2 K. B. 385. (3) [1919] 1 I. R. 361.

Lord Halsbury, in dealing with the question as to the rightful guardianship of an illegitimate child, said that he doubted very much whether any absolute rule could be laid down, but he pointed out that in *The Queen* v. *Nash* (1) the question came for decision before the Court of Appeal. He said that Sir Geo. Jessel appeared to have pointed out the distinction between strict legal rights as to guardianship and the jurisdiction which a Court of equity exercised in regard to such orders as were in question in the case under review. He said that Sir Geo. Jessel pointed out that that Court was now governed by equitable rules, and that in equity regard was always had to the mother, the putative father, and the relations on the mother's side. Later on, he said it was clear that the law had placed upon the mother of an illegitimate child obligations which ought to, and in his opinion did, bring with them corresponding rights. He said that whether the right was, as Lord Justice Lindley expressed it, a prima facie right to the custody, or whether it was the settled view of the Court of equity that the mother's wishes ought to be consulted if she had not forfeited the right to be consulted by any misconduct of her own, seemed to him to be immaterial to decide, since he was of opinion that no misconduct was established against the mother which disentitled her to exercise her right to be considered in respect of the custody of the child in question. Lord Herschell in his judgment reviewed the authorities, and having referred to the decision in *The Queen* v. *Nash* (1), said that he thought that case determined, and he concurred in the decision, that the desire of the mother of an illegitimate child as to its custody was primarily to be considered. Of course, he said, if it can be shown that it would be detrimental to the interests of the child that it should be delivered to the custody of the mother, or of any person in whose custody she desired it to be, the Court, exercising its jurisdiction, as it always did in such a case with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother. At p. 398 he says: "Whatever may have been the view in former times, I cannot but think that the legislation embodied in the Poor Law Act (4 and 5 Wm. 4, c. 76), s. 71, renders it impossible in the present day to regard the mother of an illegitimate child as destitute of any rights in relation to its custody. The obligation cast upon the mother of an illegitimate child to maintain it till it attains the age of sixteen appears to me to involve a right to its custody." In *The Queen* v. *Nash* (1), referred to in these judgments, the mother of the illegitimate child was delivered of a female child on the 14th May, 1876. Shortly after the infant's birth the mother placed it in the custody of the wife of a labouring man. She then obtained a situation, but fell into ill-health and went into an infirmary. She made some payments to Nash and the wife for the child, but was unable to continue them. After leaving the infirmary she became the mistress of a gentleman. The child continued with the Nashes up to the time of the decision. In December, 1882, she applied for a habeas corpus against Nash to bring up the child that it might be delivered to her. The application was refused by Mr. Justice North. The mother then appealed to a Divisional Court, who reversed the decision, and ordered the habeas corpus to issue, and this decision was affirmed by the Court of Appeal.

(1) 10 Q. B. D. 454.

Ch. Div. *(S. I.)* *Powell J.* 1922.

Re GAVAGAN.

The Master of the Rolls (Sir Geo. Jessel) pointed out that the appellants had not a particle of right to the custody of the child, and had set up the case that the child's natural mother was no relation to it, and had no more claim to its custody than any stranger. He referred to the case of *Ex parte Knee* (1), before Sir James Mansfield, in which it was held that the mother had such a right, unless ground was shown for displacing it. Sir Geo. Jessel goes on to say : " The Court is now governed by equitable rules, and in equity regard is always had to the mother, the putative father, and the relations on the mother's side." Natural relationship was thus looked to with a view to the benefit of the child. There is, he says, in such a case a sort of blood relationship which, though not legal, gives the natural relations a right to the custody of the child. He pointed out that the mother did not wish the child to be with her, but to be placed with her sister, a respectable married woman with one child, and said that it could not be contended that it was for the benefit of the child to remain with the appellants. Lord Lindley, in agreeing, said " we cannot interfere with the right of the mother in favour of persons who are mere strangers. There is, indeed, no legal relationship, but there is a natural one; and the affection of the mother for the child must be taken into account in considering what is for the benefit of the child. The right of the mother as against the appellants is, to my mind, clear." Lord Justice Bowen said that he believed the appellants were acting with a view to the benefit of the child, but that philanthropy sometimes makes mistakes. " The question is whether, in considering what is for the benefit of the child, the Court will have regard to the natural relationship? When we consider what is for the child's benefit, the scale is turned by the respectability of the person with whom she is to be placed."

It will be observed that in *Barnardo's Case* (2) and in *Nash's Case* (3) the contest for the custody of the child in each case was between the mother of the illegitimate child and strangers. I am dealing in the present case with a contest between the mother of the illegitimate child and the father of the child, who has married the mother. Both Lord Halsbury and Lord Herschell in their judgments in *Barnardo's Case* (2) point out that the obligations which the law has placed upon the mother of an illegitimate child brought with them corresponding rights to the custody; and Lord Herschell refers in express terms to the legislation in that respect embodied in the Poor Law Act (4 & 5 Wm. 4, c. 76), sect. 57, which makes the husband liable to maintain children of his wife born before marriage as part of his family. In Ireland the corresponding section is sect. 53 of 1 & 2 Vict. c. 56, which is as follows :—" That for the purposes of this Act every husband shall be liable to maintain his wife and every child under the age of fifteen, whether legitimate or illegitimate, which she may have had at the time of her marriage with such husband. And every father shall be liable to maintain his child, and every widow to maintain her child, and the mother of every bastard child to maintain such bastard child until such child respectively shall attain the age of fifteen years."

Mr. Hughes contends that this section imposes concurrent obligations on the father and on the mother. I do not agree that that is the proper construction of the statute. I think there is an absolute

(1) 1 B. & P. (N. R.) 148. (2) [1891] A. C. 388. (3) 10 Q. B. D. 424.

obligation on the father to support and maintain this child. Even if he were not the father of the illegitimate child, still, having married the mother, there would be an obligation on him to support the child as one of the family. Several decisions in England under the Bastardy Acts appear to me to establish this. In *Steacy* v. *Lintel* (1), the head-note is :—"The 35th and 36th Vict. c. 63, sect. 3, enacts that any single woman who may be with child, or who may be delivered of a bastard child, may, either before the birth, or at any time within twelve months from the birth of such child, make application for a summons against the putative father. Held, that no such application can be made if the mother has married since the birth of the child, and is at the time of the application living with her husband." Mr. Justice Lush said that the policy of the Bastardy Acts was to assist the mother in maintaining the child which had no legitimate father and was dependent upon her for support. He said it had been settled by decisions upon the construction of the earlier Acts that the term "single woman" was not confined to unmarried women, but might include married women who were reduced to the condition of single women by widowhood or otherwise. He then said the Act 4 & 5 Wm. 4, c. 76, sect. 7, makes the husband liable to maintain the illegitimate child of his wife born before the marriage, so that as soon as the mother of a bastard child marries there is a person as much bound to maintain it as though it were his own child.

Humphreys v. *Polak and Wife* (2) decides that a contract between the mother of an illegitimate child and another person for the transfer to that person of the rights and liabilities of the mother in respect of the child is invalid. Lord Justice Vaughan-Williams points out, whether or not there was at common law a duty on the part of the mother towards her illegitimate child, and whether or not the series of legislative enactments on the subject, such as the Poor Law Amendment Act of 1834, merely recognized and defined the right, that those enactments did undoubtedly impose a duty on the mother in respect of her illegitimate child. Sterling L.J., referring to the case of *Barnardo* v. *M'Hugh* (3), says that the right of the mother is given to her, not for the benefit or gratification of the mother, still less as part of her property, but in order to enable her to discharge the duties which the law imposes on her in respect of the infant, and for its benefit. That being so, he says, it is impossible that the plaintiff, who is the mother of the child, should divest herself of those rights in favour of another person.

In the present case the duties which the law imposes in respect of this child are imposed upon the father, in my opinion, and not upon the mother; but the mother by her action in taking this child away from the custody of the father, and concealing its whereabouts, has rendered it impossible for him to discharge the duties which the law imposes on him.

It seems to me that if I am to have regard to the statements of the law laid down by Lord Halsbury and Lord Herschell, that the obligations cast upon the mother of an illegitimate child to maintain it under the Poor Law Acts bring with them corresponding rights; and, as Lord Herschell says, involve a right to its custody and, inasmuch as in the present case those obligations are imposed, not upon the

(1) 6 Q. B. D. 291. (2) [1901] 2 K. B. 385. (3) [1891] A. C. 388.

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mother, but upon the father, they involve a right to its custody by him. Even if the obligations on the father and mother were concurrent, it would seem to me to be an extraordinary result that the mother of an illegitimate child married to its father could be permitted to remove the child from its home, where the father was willing and able to perform, and was in fact performing, his obligations to it, without his consent and against his wishes, and wilfully to conceal the whereabouts of the child, leaving the father in the position of being liable for its support and maintenance, while depriving him of his right voluntarily to fulfil his obligations. No doubt Mrs. Gavagan's brother states that he is willing to be responsible for the upkeep, maintenance, and education of the child during its minority, but it does not seem to me that this is an obligation which could be enforced against him, or that it would be any answer in law to a claim brought by the guardians against the father in the event of Mr. Morris being unable or unwilling at any future time to fulfil his promise.

The father here claims the right to the custody of the child, and is willing to undertake the responsibility which the law casts upon him. Furthermore, as Lord Herschell says, it is no longer important to inquire what are the rights of the mother in relation to an illegitimate child at common law. All the Courts are now governed by equitable rules, and empowered to exercise equitable jurisdiction. And the learned Lord, having stated that the desire of the mother of an illegitimate child as to its custody is to be primarily considered, goes on to say that if it can be shown that it would be detrimental to the interests of the child that it should be delivered to the custody of the mother, or of any person in whose custody she desires it to be, the Court, exercising its jurisdiction, as it always does, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother.

How can I say that it is for the benefit of this child that, having been surreptitiously taken away from the custody of the father, where it was being brought up as a member of the family, it should continue to be kept in the custody of a person or persons wholly unknown to the father and wholly unknown to the Court, the mother positively refusing to disclose either to the father or to the Court the whereabouts of the child? I think that the circumstances in which this child was spirited away from the custody of the father and delivered into the custody of persons wholly unknown deprive the mother of the right to have her wishes considered, even if, in the circumstances of the present case, her wishes were primarily to be considered. I do not think that it is for the benefit of the child that the present state of things should be allowed to continue, and consequently, in my opinion, I am bound to make an order declaring that James Gavagan, the father of James Gavagan or Morris, is entitled to the custody and guardianship of the minor during his minority or until further order, and that Alice Gavagan be ordered to deliver up the said James Gavagan or Morris into the custody of James Gavagan within one week from the service of this order upon her.

I am not deciding the question as to the particular form of religion in which the child is to be brought up. If the father seeks to bring the child up in the Roman Catholic religion, and if the mother wishes the child to be brought up in the Protestant religion, it will be open to her, under the Guardianship of Infants Act, to apply to the Court for directions on the point, and the question can then be determined.

Solicitors for James Gavagan: *Messrs. Webb, Scott, & Seymour.*
Solicitors for Annie Gavagan: *Denis J. Hannon.*

C. N. K.

[HOUSE OF LORDS.]

H. L.
1922.
Nov. 13.

CONGESTED DISTRICTS BOARD FOR IRELAND, APPELLANTS, AND ATTORNEY-GENERAL FOR IRELAND, RESPONDENT (1).

Land Purchase—Congested Districts Board—Expenditure on improvements—Sale to tenant at enhanced price—Advances for the purpose of the Land Purchase Acts—Repayment in cash or in Land Stock—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *sect.* 72, *sub-s.* 3; *Irish Land Act*, 1909 (9 *Edw.* 7, *c.* 42), *sect.* 3.

Sect. 72, sub-s. 3, of the Irish Land Act, 1903, provides that when the Congested Districts Board have expended money on the improvement of an estate, and in consequence have sold parcels of that estate at an enhanced price to tenants or others, the National Debt Commissioners may advance to the Land Commission for repayment to the Congested Districts Board such sums as represent the increase of price consequent on the improvements.

Held, reversing the order of His Majesty's Court of Appeal in Ireland ([1921] 1 I. R. 258), and restoring the judgment of Powell J. ([1920] 1 I. R. 266), that the Congested Districts Board are entitled to receive such advances in money and not in Land Stock, section 3 of the Irish Land Act, 1909, not applying to such advances.

Counsel for the appellants:—

S. L. Brown K.C. and *R. G. Leonard K.C.*, of the Irish Bar (with them *J. M. FitzGerald*, of the Irish Bar, and *R. O'Sullivan*, of the English Bar).

Counsel for the respondents:—

William Carrigan K.C. and *A. B. Babington K.C.* (with them *E. S. Murphy K.C.* and *A. C. Newett*), all of the Irish Bar.

THE LORD CHANCELLOR (VISCOUNT CAVE) (2):—

My Lords, this is an appeal by the Congested Districts Board for Ireland from a judgment of His Majesty's Court of Appeal in Ireland, reversing a decision of Mr. Justice Powell, and raises a question as to the right of the Board to receive repayment in cash of its expenditure on the improvement of lands purchased and re-sold by the Board under the Irish Land Acts. The amount involved in the appeal is small, but the decision will govern other cases.

The Congested Districts Board for Ireland has power under a series of statutes to purchase lands in congested areas, to improve the purchased lands and to re-sell them, generally in larger holdings, to tenants and others. The purchase of land and the improvement of lands purchased are financed in different ways, which it is important to keep distinct. The sums required by the Board for the purchase of land are

(1) Before VISCOUNT CAVE C., VISCOUNT FINLAY, and LORDS DUNEDIN, ATKINSON, and SHAW of DUNFERMLINE.

(2) The report of the judgments in the House of Lords has been printed from the shorthand notes of Messrs. W. B. Gurney & Son.

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advanced to them by the National Debt Commissioners through the Land Commission, and, with interest at 2¾ per cent. per annum, are debited to the Board in the books of the Land Commission (see Irish Land Commission Act, 1903, sect. 72, sub-ss. 1 and 2); and on the land being re-sold to a tenant or other purchaser, the amount of the purchase-money, whether paid by the purchaser in cash or treated as an advance to him, is written off the debt due from the Board to the Land Commission (see Irish Land (Finance) Rules, 1912, rule 26). On the other hand, any sums which the Board may desire to expend on the improvement of an estate are provided by the Board out of its own income derived from the yearly Government grant; and if the estate is subsequently sold at a price exceeding the purchase-money, the Board is entitled to be repaid by the Land Commission such sum as represents the increase of price consequent on the improvement (see Irish Land Act, 1903, sect. 72, sub-s. 3, and Irish Land (Finance) Rules, 1912, rule 28). Your Lordships were informed that the amount so repayable is generally less than, and on the average about one-half of, the amount actually spent on improvements, so that there is an annual loss to the Board under this head.

In order to make the matter clear, it is desirable to quote the words of the Act and rules regulating the repayment of moneys spent on improvements. Sect. 72, sub-s. 3, of the Irish Land Act, 1903, is in these terms: "Regulations made by the Treasury may provide that where the Congested Districts Board have expended money on the improvement of an estate, and in consequence have sold parcels of that estate at an enhanced price to tenants or others, the National Debt Commissioners may advance to the Land Commission, for repayment to the Congested Districts Board, such sums as represent the increase of price consequent on the improvements"; and rule 28 of the rules of 1912 is in these terms: "For the purpose of ascertaining the amount payable to the Congested Districts Board in respect of estates purchased and re-sold under the Act of 1903, as amended or extended by the Act of 1909, at an enhanced price, consequent on improvements or otherwise, a separate account shall be kept of each estate purchased by the Congested Districts Board. When parcels of an estate have been sold to an amount corresponding to the amount advanced from the Irish Land Purchase Fund, the further advances in respect of any additional parcels of land on the estate shall be paid to the Congested Districts Board by the Land Commission." In the present case the Congested Districts Board purchased an estate at Kilagh, in the County of Galway, at the price of £1,024, payable in Guaranteed Land Stock, provided by the Land Commission. They improved the estate by the erection of fences and buildings at a cost of £77 12*s.* 7*d.*, which was provided in cash out of the income of the Board. They then re-sold the land in parcels for the total enhanced price of £1,090; and it is not disputed that the difference of £66 represents the increase of price consequent upon the improvements. This sum of £66 the Board accordingly claimed from the Land Commission; but their claim was disputed by the Commission, who, acting on the instructions of His Majesty's Treasury, contended that the Board was entitled only to £66 of immature Guaranteed Three per Cent. Land Stock, equivalent in value to about £38. In other words,

the Treasury claimed that the increase of price due to the expenditure on improvements was repayable in stock and not in cash. Thereupon this action was commenced by the Board against His Majesty's Attorney-General for Ireland, claiming "a declaration that the plaintiffs are entitled to repayment by means of money of such sums as from time to time become repayable to them under the provisions of sect. 72, sub-s. 3, of the Irish Land Act, 1903, in cases where the plaintiffs have expended money on the improvement of an estate, and in consequence have sold parcels of the estate at an enhanced price to tenants and others, and have become entitled to repayment as provided by the said section of such sum as represents the increase of price consequent on the improvements." The action was heard by Mr. Justice Powell, who made the declaration asked for; but on appeal the Court of Appeal (consisting of the Lord Chief Justice, Lord Justice Ronan and Lord Justice O'Connor) reversed his decision, and in lieu thereof made an order in the following terms:—"It appearing to the Court that the price of £1,024, and the enhanced price of £1,090, mentioned in paragraphs 5 and 6 respectively of the statement of claim in this action were in fact paid by the transfers of sums of £1,024 and £1,090 Guaranteed Three per Cent. Stock, which were duly accepted as payment thereof, pursuant to sect. 3 of the Irish Land Act, 1909, and that the entire increase of price was consequent on the improvements made by the plaintiffs by means of the sum of £77 12*s.* 7*d.* expended by them, the Court doth declare that the increase of price consequent on the said expenditure is a sum of £66 of the said stock, and that the plaintiffs are only entitled to receive that amount of the said stock or its equivalent value in cash, and doth adjudge the same accordingly." Thereupon the present appeal was brought.

My Lords, I find myself unable to agree with the decision of the Court of Appeal. The decision appears to be founded on the provisions of sect. 3 of the Irish Land Act, 1909, under which an advance for the purposes of land purchase may be made wholly or partially by means of the issue of Government Stock equal to the amount of the advance, and the stock so issued is to be accepted as between vendor and purchaser as the equivalent of the corresponding amount of the purchase-money. But this provision has reference, as appears from its terms, only to advances for the purchase of land under the Land Purchase Acts, and has no application whatever to the repayments of moneys spent by the Congested Districts Board on improvements. Section 72 of the Act of 1903 provides that those advances shall be repaid in cash, and there is nothing in the Act of 1909 which refers to these repayments, or compels the Board to accept in lieu of cash stock of the same nominal amount, but worth little more than one-half of its nominal value.

The decision of the Court of Appeal appears to be founded on the view, which appears in all the judgments and in the formal order of the Court which I have quoted, that on the re-sale of lands purchased by the Congested Districts Board the price payable by the purchaser is payable in stock, but this is not the case. The price is not payable in stock; the purchaser has no stock to give, nor, if he had, would the Land Commission be compellable to accept it. The price is payable in cash—namely, by means of a purchase annuity calculated at the

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rate of 3¼ per cent. per annum on the sum to be paid, of which 2¾ per cent. represents interest, and the remaining half per cent. is a payment to a sinking fund on account of the principal, these yearly payments being continued until the whole sum, with interest, has been paid (see Irish Land Act, 1903, sect. 45). It is true that the purchase annuity may be redeemed in the meantime, but this can only be done by paying to the Land Commission the difference between the accumulated sinking fund and the sum required to purchase, at the average net price, the amount of the advance (see Irish Land Act, 1903, sect. 46, and the Irish Land (Finance) Rules, 1912, rule 19). In other words, the Land Commission ultimately receive the whole amount in cash, with interest, and there is no justification for the claim to repay the amount spent on improvements to the Board in stock. An ingenious argument in support of the decision of the Court of Appeal was put forward by Mr. Babington on behalf of the respondent. He contended that, having regard to the provision in the Act of 1909, a re-sale of land purchased by the Congested Districts Board is in law a sale by landlords for stock; and accordingly that the enhanced price in question is nominally received by the Commissioners in stock, and is to be repaid to the Board in the same currency. I am unable to accept this view. An ordinary landlord who sells his land under the Land Purchase Act is no doubt bound to accept the purchase-money in stock; but any such obligation is excluded so far as the Congested Districts Board is concerned by the provisions of the Acts and regulations which entitle the Board to have the purchase-money written off the sum advanced by the Commissioners on the original purchase, and to have any increase of price due to improvements paid to the Board in cash.

My Lords, in my opinion this appeal should be allowed, the judgment of the Court of Appeal should be set aside, and the judgment of Mr. Justice Powell restored; and I move your Lordships accordingly. No question of costs arises.

Viscount Finlay:—

My Lords, I am of the same opinion. By the Irish Land Act of 1903, in the 72nd clause, provision is made by the third sub-section, which in effect is one for repayment to the Congested Districts Board of money expended by that Board on the improvement of an estate in consequence of which parcels of the estate have been sold at an enhanced price. Provision is made in effect by this clause that the Congested Districts Board should be repaid such sums as represent the increase of price consequent on the improvements.

Now, my Lords, the conclusion arrived at by the Court of Appeal in Ireland has this effect, that the sum does not represent the real amount of the enhancement of price consequent on the improvements; it represents something less. Mr. Justice Powell, who first heard the case, was reversed by the Court of Appeal. Mr. Justice Powell said that what the section meant was the real amount. The Court of Appeal took the other view, but I cannot find that they dealt in any satisfactory way with the reasoning of Mr. Justice Powell's judgment. I entirely agree with the way in which Mr. Justice Powell dealt with the case, and it appears to me that his judgment ought to be restored.

LORD DUNEDIN :—

My Lords, I agree. When it is said that expended money is to be repaid to such an extent as represents the increase of price, the obvious meaning is that it is to be repaid in money, unless we have some clause saying anything to the contrary; and when one finds that the only thing that is said to the contrary is, "notwithstanding anything in sect. 27, advances for the purposes of the Land Act may be made in whole or in part in stock," the simple answer is that this payment of money is not an advance for the purposes of the Land Act.

My Lords, I do not wish to repeat all that has been said by my noble and learned friend on the Woolsack. All I can say is that I think the argument against Mr. Justice Powell's judgment is so hopeless as scarcely even to deserve the compliment of perverted ingenuity.

LORD ATKINSON :—

My Lords, I concur. I do not think it is necessary to add anything except this, that I think the exhaustive and clear judgment of Mr. Justice Powell was both sound and entirely convincing.

THE LORD CHANCELLOR :—

My Lords, I am authorized to state that my noble and learned friend, Lord Shaw, concurs in the judgment to be pronounced.

The order of Powell J. was accordingly restored.

Solicitor for the appellants: *Herbert Z. Deane*, agent for John O'Connor.

Solicitor for the respondent: *The Treasury Solicitor*, agent for Patrick Coll, Treasury Solicitor in Ireland.

High Court of Appeal.
1922.
Nov. 4.

JOHN MAHER LOUGHNAN, PLAINTIFF, *v.* EUGENE O'SULLIVAN AND, BY ORDER, JEREMIAH O'SHEA, DEFENDANTS, AND, BY ORDER TO PROCEED, JOHN MAHER LOUGHNAN, ALFRED GEORGE HOLLINSHEAD, AND JOHN SCULLY, OFFICIAL AND CREDITORS' ASSIGNEES OF SAID JOHN MAHER LOUGHNAN, A BANKRUPT, PLAINTIFFS, *v.* EUGENE O'SULLIVAN AND JEREMIAH O'SHEA, DEFENDANTS.

(1918. No. 911.)

Set-off—Equitable set-off—Form of debt—Effect of Judicature Acts—Procedure—Present debt—Mutual debts—Discretion of Court.

The defendants appealed to the High Court of Appeal for Ireland (1) from the decision of the Court of Appeal in Southern Ireland (2).

The Court, without calling upon counsel for the respondents, dismissed the appeal with costs.

H. J. M'C.

(1) Before Ross C., HENRY C.J., and DODD J. (2) Ante, p. 106.

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BANKER AND CUSTOMER—Set-off—*Statute-barred debt—Principal and surety—Payment of surety.*] M., the principal on a promissory note to the N. Bank, died before the note became payable, and the note was not paid on maturity. After more than six years had elapsed (no part-payment or acknowledgment having been made), the bank set off the amount of the note against moneys due by them to the plaintiff, one of the sureties on the note. The plaintiff then claimed as a creditor of M. to administer his estate in respect of this indebtedness. *Held*, affirming the decision of the Court of Appeal in Southern Ireland and the judgment of Powell J., that the plaintiff was not a creditor in respect of the moneys which the bank had applied in discharge of the note. A bank has not a lien in respect of a deposit or balance to the credit of a customer, inasmuch as there is no specific property on which a lien can operate; the only right of the bank is a right of set-off, but such a right cannot be exercised where a debt is statute-barred and not recoverable. *In re Morris, Coneys* v. *Morris* CH. DIV. 81; APP. (S.I.) 90; [H.C.A.I. 136

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CHARITY—GIFT TO—*Charitable Donations and Bequests (Ireland) Act*, 1844 (7 & 8 *Vict. c.* 97), *ss.* 15, 16—*Estate in land—Trust for conversion—Death of testator within three months of execution of will.*] H. O'C. by his will devised and bequeathed all his real and personal property not thereby otherwise disposed of to trustees upon trust to sell, call in, and collect the same, and out of the moneys to pay his funeral and testamentary expenses and debts, and the legacies other than specific thereby bequeathed. He bequeathed twelve pecuniary legacies of £500 each to twelve charitable institutions, and directed that they should not be payable till after the death of his sister M. O'C. He bequeathed to her for life the net income of all his residuary, real, and personal estate, and all investments representing the same. He further devised and bequeathed, after payment of the

CHARITY—*continued.*
charitable legacies, the net residue of his property on his sister's death upon trust for such of the charitable institutions as he had previously named in his will as his trustees should select, and they appointed the residuary estate among the charitable institutions mentioned in the will in equal shares. H. O'C. died within three months from the date of his will, leaving M. O'C. his sole next-of-kin and heiress-at-law him surviving. M. O'C. by her will gave certain legacies, and devised and bequeathed the residue of her property, real and personal, in equal shares to the several charitable institutions named in her brother's will. She also died within three months from the date of her will. *Held*, by the Master of the Rolls and by the Court of Appeal in Southern Ireland, that M. O'C. as heiress-at-law and next-of-kin of H. O'C. became entitled to his real and chattel real estate subject to the trust for conversion, and that she took the real and chattel real property in its converted state. But *held* by the Court of Appeal, reversing the Master of the Rolls, that M. O'C. took an "estate in lands" under the will of H. O'C., and that, there being under his will a valid existing trust for sale of the lands, the equitable fee was vested in all the persons entitled to the money resulting from such sale, and that therefore the residuary devise in M. O'C.'s will was invalid as contravening the 16th section of 7 & 8 Vict. c. 97. *In re O'Connor, M'Dermott* v. *Attorney-General for Ireland*
[M.R. 139; APP. (S.I.) 143.

COMPANY — DEBENTURES — Equitable charge — *Companies (Consolidated) Act*, 1908, *ss.* 93, 210, 212—*Cash paid at time of creation of charge—Fraudulent preference.*] The Olderfleet Shipbuilding and Engineering Company was incorporated as a limited company in 1910. The articles of association provided, inter alia, that—1, the management of the business should be vested in the directors; 2, the directors should have authority to effect or abandon any negotiation or arrangement in relation to the business of the company; and 3, the directors should not borrow more than £6,000 without the sanction of a general meeting. Financial difficulties having arisen in November, 1920, at an extraordinary general meeting resolutions were passed appointing a committee to arrange to raise £50,000 on debentures and deposit of the company's title deeds, and authorizing the directors to borrow in excess of the £6,000. On the 9th December, at another extraordinary general meeting, the committee reported that the Ulster Bank had offered to lend £50,000 on the security of debentures for that amount, personal guarantees for £20,000, and a deposit of the company's title deeds. The offer

COMPANY—*continued.*
was accepted by resolution of the meeting. At the close of this meeting the directors met, and resolved that the company should open an account with the Ulster Bank, and arrangements were made as to drawing cheques on this account. On the 17th December the secretary of the company sent the title deeds to the bank. On the 14th January, 1921, at a directors' meeting resolutions were passed that sixty debentures of £1,000 each should be issued, and that the secretary be authorized to deposit the company's title deeds. The debentures were issued on the 26th January, 1921. On the 20th January the secretary of the company purported to make a formal deposit of the title deeds, which had been retained by the bank since the 17th December, 1920. The debentures were registered on the 1st February, 1921. On the 1st January, 1921, the bank had advanced over £49,000, and on the 1st February their total advances amounted to over £52,000. These advances had been used, inter alia, for the payment off of the company's previous bankers. A resolution voluntarily winding up the company was passed on the 23rd February, 1921, and an order for the compulsory winding up was made on the 22nd March following. On summons by the liquidator: *Held*, 1, that there was no equitable charge in favour of the bank prior to 14th January, 1921, requiring to be registered under sect. 93 of the Companies (Consolidation) Act, 1908, which would invalidate the subsequent legal debentures; 2, that although £49,000 was advanced by the bank before the 1st January, 1921, these advances were cash paid to the company at the time of the creation of the charge within the meaning of sect. 212 of the Act; and 3, that the transactions with the bank did not constitute a fraudulent preference within sect. 210. *In re the Olderfleet Shipbuilding and Engineering Company, Ltd.* - - - 26

COMPANY—"Foreign" company registered in England carrying on business in Southern Ireland - - - - - - 100
See COMPANY—WINDING UP.

COMPANY — WINDING UP — Company registered in England and carrying on business in Southern Ireland—"Unregistered" Company—*Treaty—Irish Free State (Agreement) Act*, 1922 (12 *Geo.* 5, *c.* 4)—*Jurisdiction of Courts of Southern Ireland—Whether company a "foreign" company.*] The Portarlington Electric Light and Power Company, Ltd., was incorporated as a limited company under the Companies Acts on the 19th August, 1913, and had its registered office in London. By resolution dated the 3rd April, 1922, C. was appointed a liquidator in the voluntary winding up of the

COMPANY—*continued.*

company. On 31st March, 1922, the Irish Free State (Agreement) Act (12 Geo. 5, c. 4) was passed, confirming the Articles of Agreement for a treaty between Great Britain and Ireland, signed the 6th December, 1921. The Act took effect from the 31st March, 1922. Under the Articles of Agreement Ireland was declared to have the status of the Dominion of Canada. Under the Provisional Government (Transfer of Functions) Order, 1922, dated 1st April, 1922 (London *Gazette*, 4th April, 1922), the functions of certain departments, including the Board of Trade, were transferred to the Provisional Government of Southern Ireland, set up in accordance with the Articles of Agreement of December, 1921. On petition by a shareholder for the compulsory winding up of the company as an unregistered company: *Held*, that notwithstanding the provisions of the Articles of Agreement of December, 1921, the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), and of the orders thereunder, the provisions of the Companies Acts remain in full force until revoked or altered by a competent legislature, and that the courts of Southern Ireland had no jurisdiction to make the order sought for in the petition. *In re Portarlington Electric Light and Power Company, Ltd.*

[SAMUELS J. 100

CONGESTED DISTRICTS BOARD—Expenditure on improvements—Right to repayment of, in money - - 155
See LAND PURCHASE—EXPENDITURE ON IMPROVEMENTS.

CONVERSION—Trust for—Death of testator within three months of execution of will - - - - - 139, 143
See CHARITY—GIFT TO.

DAMAGES FOR LOSS OF BARGAIN—Vendor not having title—Deceit not pleaded - - - - - - 62
See VENDOR AND PURCHASER—SPECIFIC PERFORMANCE.

DECEIT—Damages for loss of bargain—Breach of contract—Deceit not pleaded - 62
See VENDOR AND PURCHASER—SPECIFIC PERFORMANCE.

DOCUMENTS—"Drawing documents" 13
See SOLICITOR—BILL OF COSTS. 1.

DOUBLE PORTIONS - - - 59
See WILL—ADEMPTION.

EASEMENT—**Way of necessity**—*Land-locked tenement—Grants made at different times—No evidence as to date when owner parted with the last portion of land surrounding the alleged dominant tenement.*] The plaintiff was the owner of a farm of land which he had purchased under the provisions of the Irish Land Act, 1909, and which immediately adjoined an historic moat, consisting of a circular close, on which timber was growing, and which was completely surrounded by lands in the occupation of persons, some of whom were tenants of the Earl of Erne, and others of whom (including the plaintiff) had purchased their holding from him. In the year 1919 the defendant purchased the fee-simple of the moat from the Earl of Erne, and subsequently proceeded to cut down the timber growing on it, and to remove it by a pass leading to the county road, claiming that he had a right so to use the pass as a way of necessity. In an action for an injunction to restrain the defendant from carting the felled timber over the pass: The House of Lords *held*, that no evidence having been given to establish beyond reasonable doubt what were the dates on which Lord Erne had parted with the several portions of land surrounding the close, it was impossible to say over which plot of land the implied easement of necessity existed, and dismissed the appeal from the judgment of the Court of Appeal in Ireland ([1921] 1 I. R. 148), which declared that the defendant was not entitled to use the pass in the way claimed. *Browne* v. *Maguire* H.L. 23

"ELDEST LEGITIMATE MALE ISSUE" [54
See WILL—ESTATE IN REALTY.

EQUITABLE CHARGE - - 26
See COMPANY—DEBENTURES.

ESTATE IN LANDS - - - 139, 143
See CHARITY—GIFT TO.

FATHER—Right of, to custody of illegitimate child of his wife - - - 148
See INFANT—CUSTODY.

FEE-FARM GRANT—Sale by way of, by tenant for life - - - - 71
See SETTLED LAND ACTS.

FRAUDULENT PREFERENCE - 26
See COMPANY—DEBENTURES.

ILLEGITIMATE CHILD—Right of father to custody of illegitimate child of wife 148
See INFANT—CUSTODY.

IMPROVEMENTS—Congested Districts Board entitled to repayment in money, of advances made for - - 155
See LAND PURCHASE—EXPENDITURE ON IMPROVEMENTS.

INFANT—CUSTODY—Illegitimate child—*Right of father to custody of illegitimate child of wife—Benefit of child.*] The respondent gave birth to an illegitimate male child, and subsequently married the father. After the marriage the child resided with his parents, and was supported and maintained by his father as one of the family. Disputes having arisen between husband and wife, the latter left her husband's house; and having taken the illegitimate child with her, sent him to some friends. She refused to disclose where or in whose custody the child was, but admitted she knew the place of his residence, and could produce him if she desired. Her brother was prepared to undertake the maintenance and education of the child, and to start him in life. On application by the father for the custody of the child: *Held*, that s. 53 of 1 & 2 Vict. c. 56 imposed an obligation on the father to support and maintain the infant illegitimate son, which obligation the father had been willing to fulfil, and had fulfilled until prevented by the act of the mother, and that therefore the father was prima facie entitled to the custody of the child: but that even if the wishes of the mother were to be primarily considered, it was not for the benefit of the child to remove him from the custody of a person bound and willing to support him to the custody of a person unknown to the father and to the Court. *Re Gavagan*
[Ch. D. (S.I.) 148

INVESTMENT — Unauthorized exercise of power of - - - - - 49
See Settlement—Construction. 2.

"ISSUE"—Meaning of, in marriage settlement 75
See Settlement—Construction. 1.

JOINT DEBT—Not set off against debt due to one alone - - - 103, 160
See Set-Off.

LAND LOCKED TENEMENT—Implied way of necessity—Evidence of dates when grants made of surrounding land requisite - - - - - 23
See **EASEMENT.**

LAND PURCHASE ACTS—ARREARS OF RENT—Sale by lunatic absolute owner—*Claim by absolute owner for sum for arrears of rent—3 Edw. 7, c. 37, s. 24, sub-s. 8.*] The Irish Land Act, 1903 (3 Edw. 7, c. 37), sect. 24, sub-s. 8, provides that, on the sale of an estate where arrears of rent were due, a sum not exceeding one year's rent shall be paid out of the purchase-money to the person who would have been entitled to receive those arrears for his own use. The real estate of a lunatic absolute owner of an estate was sold to

LAND PURCHASE ACTS—*continued.*
the tenants under the Act, arrears of rent being due. *Held*, that no sum was payable under sect. 24, sub-s. 8, to the lunatic absolute owner, and that on his death intestate the entire purchase-money retained its character as real estate, and passed to his heir-at-law and not to his personal representative. *In re Kiernan, deceased*; *Kiernan* v. *M'Gauran* - - - - - Powell J. 1

LAND PURCHASE — Expenditure on improvements by Congested Districts Board—*Sale to tenant at enhanced price—Advances for the purpose of the Land Purchase Acts—Repayment in cash or in Land Stock—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *sect.* 72, *sub-s.* 3; *Irish Land Act*, 1909 (9 *Edw.* 7, *c.* 42), *sect.* 3.] Sect. 72, sub-s. 3, of the Irish Land Act, 1903, provides that when the Congested Districts Board have expended money on the improvement of an estate, and in consequence have sold parcels of that estate at an enhanced price to tenants or others, the National Debt Commissioners may advance to the Land Commission for repayment to the Congested Districts Board such sums as represent the increase of price consequent on the improvements. *Held*, reversing the order of His Majesty's Court of Appeal in Ireland ([1921] 1 I. R. 258), and restoring the judgment of Powell J. ([1920] 1 I. R. 266), that the Congested Districts Board are entitled to receive such advances in money and not in Land Stock, section 3 of the Irish Land Act, 1909, not applying to such advances. *Congested Districts Board for Ireland* v. *Attorney-General for Ireland*
[H.L. 155

1. LAND REGISTRY—Death intestate of unregistered owner of freehold—*Order of Court directing personal representative to be registered as owner—Objection by registering authority—Application by personal representative—Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66), *sect.* 16.—*Alteration by Court of an earlier order—Jurisdiction.*] A bought his holding under the Land Purchase Acts, and it was vested in him in fee on November 3rd, 1891. He conveyed it to B on May 23rd, 1893; and on June 1st, 1908, A died intestate. On July 20th, 1908, B was registered as owner of the lands under the Local Registration of Title (Ireland) Act, 1891. C, a daughter of A, took out administration to her father. In an action brought by C, as personal representative, against B, the conveyance of 1893 was set aside; and by an order dated June 17th, 1910, the then Master of the Rolls directed that the register should be rectified by substituting the name of the personal representative of A for that

LAND REGISTRY—*continued.*
of B. The local Registrar of Titles declined to register the personal representative on the ground that on the death of A intestate the lands were freehold property. An application was made by C on December 1st, 1921, to the Master of the Rolls for an order to rectify the register by substituting her name for that of B as registered owner. The Master of the Rolls refused the motion on the ground that the lands were the freehold property of A, and that they descended on his death intestate to his heir-at-law, and not to his personal representative. *Held* (affirming the Master of the Rolls), that it was not competent for the learned Judge to make the order applied for, and that the order he had made should be varied by striking out the part declaring that the lands descended to the heir-at-law, and not to the personal representative, and by declaring that the Court had no jurisdiction to make the order sought. Per O'Connor L.J.:—Sect. 16 of the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), does not confer jurisdiction on any Court to alter its own substantial decision, and to substitute an entirely new decision for it. *O'Leary* v. *O'Dea* - - APP. (S.I.) 8

2. LAND REGISTRY—Sale by personal representative *of sole registered owner of land sold under Land Purchase Acts to more than one person without consent of Land Commission—Right of transferees to be registered as owners—Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66), *Part IV—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 54, *sub-s.* 2.] Section 54, sub-s. 2, of the Irish Land Act, 1903 (3 Edw. 7, c. 37), which provides that not more than one person shall, without the consent of the Land Commission, be registered as the owner of the holding under Part IV of the Local Registration of Title (Ireland) Act, 1891, does not apply to purchasers for value from the personal representative of a deceased registered owner of land which had been sold under the Purchase of Land Acts, and several persons so purchasing as tenants in common are entitled to be registered as owners notwithstanding that the Land Commission have not consented thereto. *In re Cleary* WYLIE J. 94.

LANDED ESTATES COURT CONVEYANCE—Mistake *in operative clause—Conclusiveness.*] By a Landed Estates Court conveyance certain lands were conveyed to A "to hold subject to the rent of £2 8*s.* 2*d.* reserved by lease of 1762." The rent reserved by the lease was in fact £2 18*s.* 2*d.* *Held*, that the rent should be redeemed on the basis of £2 8*s.* 2*d.*, the rent as set forth in the habendum of the Landed Estates Court conveyance being binding on the Court. *Jackson's Estate* [WYLIE J. 73

LIEN—Set-off of statute-barred debt by banker—Relation of banker and customer 81-90, *See* BANKER AND CUSTOMER. [136

LIMITATIONS, STATUTE OF—Set-off of statute-barred debt by banker 81, 90, *See* BANKER AND CUSTOMER. [136

LUNATIC ABSOLUTE OWNER—Sale by—Land Purchase Acts—Arrears of rent—3 Edw. 7, c. 37, s. 24, sub-s. 8 - 1 *See* LAND PURCHASE ACTS—ARREARS OF RENT.

MISTAKE in operative clause of Landed Estates Court conveyance—Conclusiveness - - - - - - 79 *See* LANDED ESTATES COURT CONVEYANCE.

NOMEN COLLECTIVUM—"Eldest legitimate male issue" - - 54, 120 *See* WILL—ESTATE IN REALTY.

PAYMENT BY SURETY of statute-barred debt set off by banker - 81, 90, 136 *See* BANKER AND CUSTOMER.

POLICY OF ASSURANCE against risk of birth of issue - - - - - 20 *See* PRACTICE—PAYMENT OUT OF COURT.

PRACTICE—PAYMENT OUT OF COURT—Policy of assurance against risk of birth of issue—*Presumption against possibility of issue.*] C. F. by settlement in 1901 settled a policy of assurance on his life upon trust as to one moiety for the issue of his daughter A. F. (then a spinster), and as to the other moiety on trust for the issue of another daughter M. F. (also a spinster), with remainder, in default of issue of the daughters, to himself absolutely, and subsequently mortgaged the policy to R., who assigned his interest to L. C. F. died intestate, and the two last-named defendants were executors of L., the mortgagee. In a suit to carry out the trusts of the settlement, the policy moneys were paid into Court, and the executors of L. applied for payment out to them of these funds on condition that they took out and lodged in Court policies of assurance payable respectively on the birth of issue to A. F. and M. F. At the date of the application A. F. was married but had no issue, and was fifty-two and a half years old, and M. F. was a spinster aged forty-five. An order was made in accordance with the prayer of the application. *Poulter and Waldron* v. *Fitzimon and Lloyd* - - POWELL J. 20

PRACTICE—SALE BY THE COURT—Reopening sale *after acceptance of tender.*] Where a private tender for the purchase of property sold by order of the Court has been

PRACTICE—*continued.*
accepted, the principles applicable to reopening biddings on a sale by auction by order of the Court will be followed. *Munster and Leinster Bank* v. *Munster Motor Co., Ltd.* - POWELL J. 15

PRINCIPAL AND SURETY—Set-off of statute-barred debt by banker 81, 90, *See* BANKER AND CUSTOMER. [136

PRIVATE TENDER—Reopening sale after acceptance by Court - - 15
See PRACTICE—SALE BY COURT.

REGISTERED LANDS—SALE OF—Costs taxable under Local Registration of Title Act (54 & 55 Vict. c. 66) - - 110
See SOLICITOR—BILL OF COSTS. 2.

REGISTRATION of transferees, on sale without consent of Land Commission by personal representative of registered owner 94
See LAND REGISTRY. 2.

REMOTENESS—Appointment void for - 75
See SETTLEMENT—CONSTRUCTION. 1.

REOPENING BIDDING after acceptance of private tender by Court - - 15
See PRACTICE—SALE BY THE COURT.

RESULTING TRUST - - - - 59
See WILL—ADEMPTION.

REVOCATION—Gift to grandson and his children in tail male—Revocation of gift to grandson—Effect on children's interest - - - - - - 115
See WILL—REVOCATION.

SALE by personal representative of sole registered owner of lands sold under Land Purchase Acts to more than one person without consent of Land Commission - 94
See LAND REGISTRY. 2.

——— by tenant for life by way of sub-fee-farm grant - - - - - - 71
See SETTLED LAND ACTS.

SET-OFF of statute-barred debt by banker [81, 90, 136
See BANKER AND CUSTOMER.

SET-OFF—Present debt—Mutual debts.] In an action upon a contract for the sale of lands, the plaintiff L., on further consideration of the action, was declared entitled to rescind the contract, and to recover from the defendant O'S. a sum of £1,253 6*s.* 7*d.* for rents and profits of the said lands, and costs of the action taxed at £353 10*s.* 9*d.* Against this O'S. was declared

by O'Connor M.R. entitled to set off (*a*) the amount of his deposit money, (*b*) £4,030 9*s.* 5*d.* alleged to be due by L. to him on foot of certain mortgages, (*c*) £858 18*s.* 6*d.*, certain costs ordered to be paid by L. to O'S. and K. jointly, and (*d*) £57 6*s.* 7*d.*, the costs of a summons under the Courts (Emergency Powers) Act, giving O'S. leave to realize the said mortgages. The plaintiffs appealed against (*b*), (*c*), and (*d*) being allowed as items of set-off. *Held*, reversing the Master of the Rolls, 1, That as regards (*b*), the mortgages having been made to the mortgagees, who, when L. became an arranging debtor in 1915, stood on their security and did not claim for the debt, the plaintiff's personal liability in respect thereof had ceased, and that as no debt existed in respect of which he could be sued, (*b*) could not be the subject of a set-off. 2. That the costs in item (*c*) being a debt due by L. to O'S. and K. jointly, could not be set off against a debt due to L. by O'S. alone. Though, since the Judicature Acts, regard must be had to equitable rights, and the exact nature of the debt looked to, yet the rule that the debts sought to be set off must be mutual and in the same right still holds good. *Bourne* v. *Bennett* (1 M. & P. 141 and 4 Bing. 423) distinguished. 3. That the costs in item (*d*) being simply made by the order "costs with demand," and not payable by anyone, were not a personal debt against the plaintiff, and could not be set off. Judgment of the Master of the Rolls varied accordingly. *Loughnan* v. *O'Sullivan and O'Shea* [APP. (S.I.) 103; H.C.A.I. 160

SETTLED LAND ACTS—Sale by way of sub-fee-farm grant or long lease—*Sale by tenant for life—Land held under fee-farm.*] A tenant for life selling in exercise of the powers conferred by the Settled Land Acts lands held under a fee-farm grant can sell in lots, carrying out the sales by making sub-fee-farm grants or long leases to the respective purchasers. *In re Braithwaite* [CH. DIV. (N.I.) 71

1. SETTLEMENT — CONSTRUCTION — "Issue" — *Appointment — Contingency — Perpetuity.*] By ante-nuptial settlement executed in 1823 freehold lands in the town of S. were settled upon trust, after the death of the survivor of the intended husband and wife, for the "issue of the said intended marriage" as the intended wife or husband should by will or deed appoint, with remainder in default of appointment to such issue in equal shares. An undivided share of leaseholds in the county of S. was also settled upon the same trusts as were limited in respect of the freeholds, or as near thereto as the different

SETTLEMENT—*continued.*

nature of the property admitted. The marriage was duly solemnized, and there were ten children born, nine of whom survived their parents. The wife survived her husband, and by her last will appointed all the settled leaseholds, and also all other hereditaments situate in the barony of C., in the county of S., over which she had power of appointment to trustees upon trust for a daughter for life, remainder to another daughter for life, remainder over to three other daughters in equal shares, or to the survivors or survivor of these three daughters living at the death of the surviving tenant for life. At the date of this will all the settled freeholds, save one parcel, had been appointed by deed under the power created by the marriage settlement. The unappointed parcel was not situate in the barony of C. In proceedings to determine the rights of claimants to funds representing the purchase-moneys of the settled leaseholds: *Held*, 1, that on the construction of the marriage settlement the word "issue" meant "children" only, and that the power of appointment vested in the wife was a single non-exclusive power over both freeholds and leaseholds; 2, that the appointment purported to be made by the will was not bad as being an exclusive appointment of a non-exclusive power extending only to the settled leaseholds, but 3, was invalid as regards the ultimate remainder, which was void for remoteness; and 4, that in the events that had happened, the persons entitled to the funds were the children entitled under the settlement in default of appointment. *In re Bromhead; Public Trustee* v. *Bromhead.*

[POWELL J. 75

2. **SETTLEMENT—CONSTRUCTION—Unauthorized exercise of power of investment**—*Marriage settlement—Trust fund.*] By ante-nuptial settlement of 1871, on the marriage of R. and W., R. granted certain freehold lands in Ireland to trustees to the use of himself for life and after his death, leaving issue, to the use that W. should receive a jointure charged upon all the premises "hereinbefore expressed to be hereby granted," and in default of children for R. absolutely. By the same settlement power was reserved to R. to appoint a jointure in favour of any after-taken wife to be charged on "the premises hereinbefore expressed to be hereby granted." By the same settlement the sum of £1,600 was assigned by W. to trustees upon trust to invest it in specified securities, and pay the income to R. for his life, and after his death to W. for her life, and subject thereto upon trust for such of the children as should attain the age of twenty-one, and in default of children upon trust for the survivor of R. and W. By the same settlement it was

SETTLEMENT—*continued.*

provided that the trustees might, at the request of R. and W., employ the £1,600 in the purchase of real estate to be held by them upon the same uses and powers "as are hereinbefore contained concerning the said premises hereinbefore expressed to be hereby granted." The fund of £1,600 was expended in the purchase of a freehold estate in Wales, which was conveyed to trustees by deed of 1902 (to which R. and W. were parties) upon trust that the trustees should hold the proceeds of such sale and the rents and profits until sale upon the trusts declared by the settlement of the investments of the £1,600. R. died leaving issue and W. him surviving. Five of the children attained the age of twenty-one, each of whom acquired a vested interest in one-fifth share in the lands settled by R. One, J. C. R., died a bachelor and intestate, and R. (his father) acquired his share as heir-at-law, and by his will devised all his real and personal estate not included in his marriage settlement upon trusts for sale to pay the income to W. (his wife) for life, and after her death for his children in equal shares. *Held*, that the words in the clause of the settlement, "the premises hereinbefore expressed to be granted," mean the freehold lands in Ireland; and that the purchase effected by deed of 1902 was an unauthorized investment, and did not deprive W. of her life estate, and that the estate of J. C. R. passed by the testator's will. *In re Webber, Webber* v. *Webber* - - - - - M.R. 49

1. **SOLICITOR—BILL OF COSTS—"Drawing documents"**—*Case for opinion of counsel—General Order under Solicitors' Remuneration Act*, 1881, *Sched. II.*] Drawing a case for counsel in contemplation of litigation comes within the expression "drawing . . . other documents" in Schedule II of the General Order, 1884, made in pursuance of the Solicitors' Remuneration Act, 1881, and is properly charged for at 2*s.* a folio. *In re Mahon*, [1893] 1 Ch. 507, and *In re R. P. Morgan & Co.*, [1915] 1 Ch. 182, followed. *In re the Rathmines and Rathgar Improvement Commissioners and Field* - - - POWELL J. 13

2. **SOLICITOR—BILL OF COSTS—Taxation—Sale of registered lands**—*Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*Local Registration of Title (Ireland) Act*, 1891, *ss.* 25; 94, *sub-s.* 1; *s.* 95.] On 15th December, 1911, S. signed an undertaking for the purchase from the Land Commission of a parcel of land which was vested in S. on the 30th July, 1918, but S.'s title to which was not registered in the Land Registry until 27th October, 1920. S., in November, 1918, had instructed his solicitor B. to put up for sale his interest in the parcel and

SOLICITOR—*continued.*
another portion of the lands, and they were ultimately sold by private treaty on 17th July, 1920, and the purchase completed on 31st October, 1920. *Held*, that B.'s bill of costs should not be taxed under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), but under the rules and schedules prescribed under the Local Registration of Title Act, 1891 (54 & 55 Vict. c. 66), the taxing officer to be at liberty to allow for any extra work entailed by the delay in registering the vendor's title. *In re Byrne, a Solicitor* - M.R. 110

SPECIFIC PERFORMANCE - - 62
See VENDOR AND PURCHASER—SPECIFIC PERFORMANCE.

STATUTES—1 & 2 Vict. c. 56, s. 53, - 148
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—— 7 & 8 Vict. c. 97, ss. 15, 16 - - 139
See CHARITY—GIFT TO.

—— 44 & 45 Vict. c. 44 - - - 110
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—— 54 & 55 Vict. c. 66, s. 16 - - 8
See LAND REGISTRY. 1.

—— 54 & 55 Vict. c. 66 - - - 94
See LAND REGISTRY. 2.

—— 54 & 55 Vict. c. 66, ss. 25, 94, 95 - 110
See SOLICITOR—BILL OF COSTS. 2.

—— 3 Edw. 7, c. 37, s. 24, sub-s. 8 - 1
See LAND PURCHASE ACTS—ARREARS OF RENT.

—— 3 Edw. 7, c. 37, s. 54 - - - 94
See LAND REGISTRY. 2.

—— 3 Edw. 7, c. 37, s. 72 - - - 155
See LAND PURCHASE—EXPENDITURE ON IMPROVEMENTS.

—— 8 Edw. 7, c. 69, ss. 93, 210, 212 - 26
See COMPANY—DEBENTURES.

—— 9 Edw. 7, c. 42, s. 3 - - - 155
See LAND PURCHASE—EXPENDITURE ON IMPROVEMENTS.

——12 Geo. 5, c. 4, Irish Free State (Agreement) Act, 1922 - - - - - 100
See COMPANY—WINDING UP.

"UNREGISTERED" COMPANY—Company registered in England carrying on business in Southern Ireland - - - - - 100
See COMPANY—WINDING UP.

UNREGISTERED FREEHOLD LAND—Intestacy—Devolution - - - - 8
See LAND REGISTRY. 1.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—Vendor not having any title—*Breach of contract—Deceit not pleaded—Damages for loss of bargain not recoverable.*] The vendor agreed with the purchaser for the sale of certain leasehold premises, and the purchaser paid a deposit on his purchase-money. At the date of the agreement the vendor had no interest in the premises agreed to be sold. The vendor died without having completed his contract. In an action by the purchaser against the vendor's personal representative for specific performance and damages: *Held*, that the action being founded upon breach of contract and not upon fraud or deceit, the damages awarded in lieu of specific performance must be confined to the loss occasioned to the purchaser by the vendor's failure to complete. *Bain* v. *Fothergill* (L.R. 7 H.L. 158) applied. *Day* v. *Singleton* ([1899] 2 Ch. 320) distinguished. *Kelly* v. *Duffy* - - - - M.R. 62

WILL — ADEMPTION — *Resulting trust — Advancement — Double portion.*] A testator bequeathed certain legacies to his daughters, his son W., and a sister. He further devised and bequeathed to his son C. a sum of £600 and a farm at The Moors, D. In the event of C. dying before attaining twenty-one years of age, the testator gave and devised the said sum of £600 and the farm to his son J., and in the event of J. dying before attaining twenty-one years of age to his son W. By his will he further devised and bequeathed a sum of £700 and a farm situate at C. to his son J., and in the event of J. becoming entitled to the said legacy of £600 and the farm at D., or in the event of J.'s death under twenty-one, gave and devised the said sum of £700 and the farm at C. to his son W. The testator devised and bequeathed his residuary real and personal estate to such of his children as should be living at his death. He died on the 14th August, 1921. On the 15th November, 1919, the testator had entered into a contract for the purchase for the sum of £4,750 of a farm at K., which by his direction was conveyed by the vendor to the testator's son J. This was after inquiry adjudged to be an advancement to J. *Held*, that the bequest of the legacy of £600 and the devise of the farm at C. had not been adeemed by the conveyance of the farm at K. *In re Wall, Lenehan* v. *Wall* - - - 59

WILL—REVOCATION—*Devise to grandson for life and his children in tail male—Revocation by codicil of gift to grandson—Effect on children's interest.*] Testatrix by her will devised her freehold lands upon trust to the use of her daughter A. M. C. for life, and after her death upon trust to the use of her grandson I. N. for life, with remainder to the use of his first and other sons in

WILL—*continued.*

tail male, and in default of such issue to the use of her grandson G. S. C. for life, with remainder to the use of his first and other sons in tail male, and in default of such issue to the use of her grandson B. M. for his life, with remainder to his first and other sons in tail male. By a codicil the testatrix revoked the clauses, limitations, and provisions contained in her will so far as related to I. N. and G. S. C. (the latter being dead), and directed and declared that her will should be read and construed as if the names of I. N. and G. S. C. had been omitted therefrom, but that in lieu of any interest or share which I. N. would have taken under will if the codicil had not been made, she directed that her trustees should pay to I. N. after her death the annual sum of £100 out of the income of her estates during his life. *Held*, that the revocation by codicil had the effect of revoking the gift of the estate tail to the issue of I. N. *In re Jermingham Trusts, Gormanstown* v. *Nicholl* [M. R. 115

WILL—ESTATE IN REALTY—Nomen collectivum—*Gift to one for life, and after his death "to his eldest legitimate male issue" — Gift over in default.*] A testator left property (including realty) to his son W. for life, and after his death to his eldest legitimate male issue, in default of which to the

WILL—*continued.*

eldest male issue of testator's late brother S., in default of which to the eldest male issue of his late sister R., on failure of her male issue to the eldest male issue of his late sister H., followed by directions as to jointuring, charging, etc., to whomsoever should possess the T. and S. estates. No disentailing deed was ever executed. *Held*, affirming the judgment of Wylie J. (ante, p. 54) (Molony C.J. dissentiente), that the phrase "eldest male issue" was a nomen collectivum, and not the description of a persona designata, and that the person entitled under the limitations in the will took as tenant in tail male. *Sheridan* v. *O'Reilly*, [1900] 1 I.R. 386, discussed. Per Ronan L.J. and Dodd J.: The lands in *Lovelace* v. *Lovelace* (Cro. Eliz. 40) being gavelkind, the case is no authority in the case of freeholds. *In re Cosby* WYLIE J. 54; [APP. (S.I.) 120

WILL—WORDS—"Eldest legitimate male issue" - - - - - 54, 120
See WILL—ESTATE IN REALTY.

WORDS—"Drawing documents"—Solicitors' Remuneration Act, 1881, sect. 2 13
See SOLICITOR—BILL OF COSTS. 1.

—— "Estate in land" - - - 139
See CHARITY—GIFT TO.

THE END.

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